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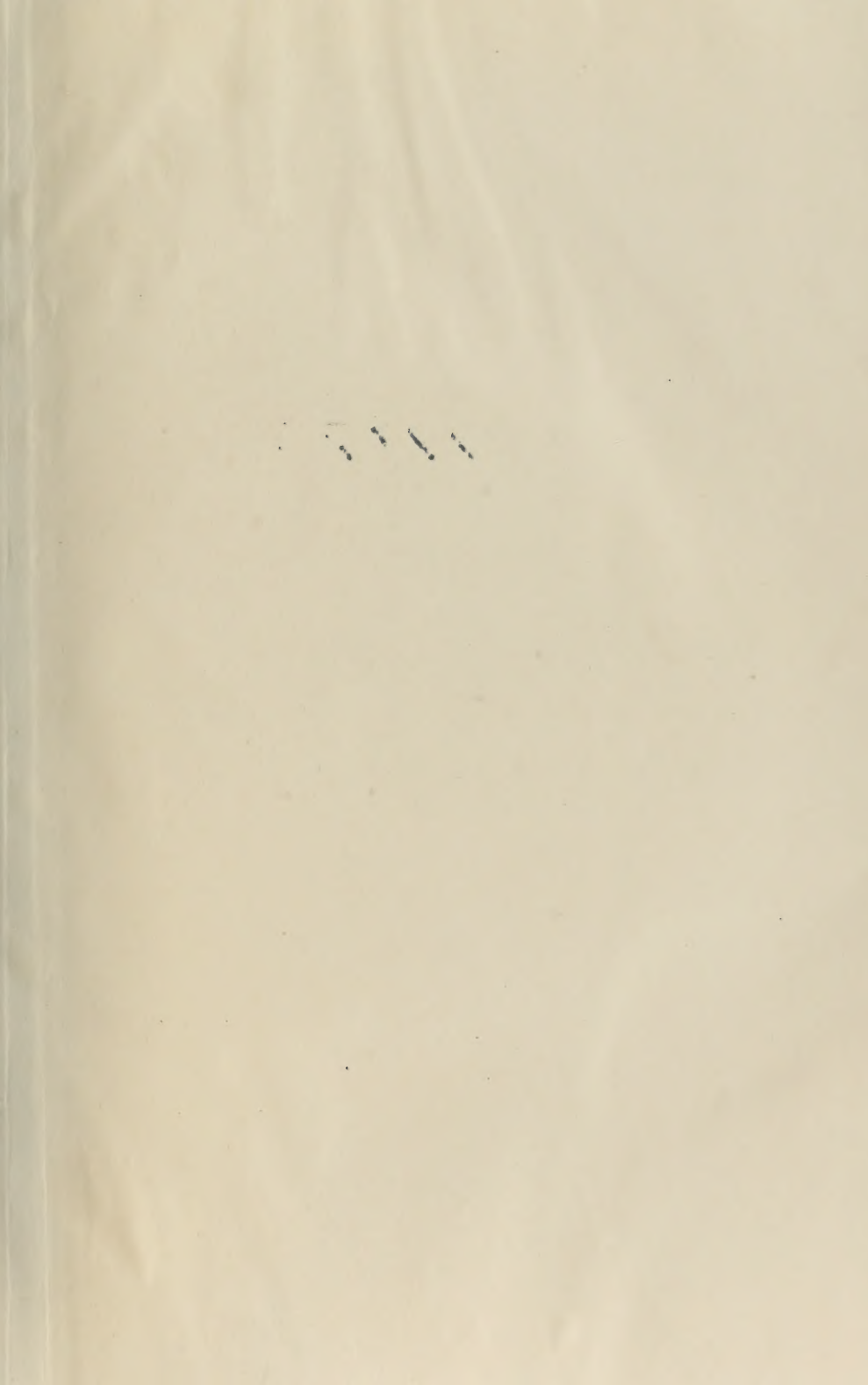
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1340

United States

# Circuit Court of Appeals

For the Ninth Circuit.

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A. EIKLAND and O. EIKLAND,

Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

Defendants in Error.

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## Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.


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**FILED**

FEB 14 1923

F. D. MONCKTON,  
CLERK.





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**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names and Addresses of Attorneys of Record.**

JOHN H. COBB, Esq., Juneau, Alaska, Attorney  
for Plaintiff in Error.

H. L. FAULKNER, Esq., Juneau, Alaska, Attor-  
ney for Defendant in Error.

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In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,  
Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-  
LEN SHATTUCK,  
Defendants.

### **Amended Complaint.**

Now come the plaintiffs by their attorney, and  
leave of the Court first being had, amend their  
original complaint herein, so that the same shall  
hereafter read as follows:

The above-named plaintiffs, complaining of the  
above-named defendants, for cause of action al-  
lege:

#### **I.**

That in the year 1913, defendants were the owners

of a certain tract of land patented as the Farnum Placer Claim, and situated in the westerly part of the town of Juneau, Alaska, and covering the flats bordering a part of Gastineau Channel, at the mouth of a certain stream known as Gold Creek, and extending on both sides of said creek, which said tract they subdivided into lots and blocks, and placed upon the market as the Casey-Shattuck Addition to the town of Juneau.

## II.

That in the said year, to wit, 1913, the plaintiffs purchased of the defendants a certain lot known and designated on the recorded plat of said Casey-Shattuck Addition, as Lot No. 6, in Block 209; and thereafter in said year plaintiffs erected thereon a substantial dwelling-house at a cost, and of the reasonable value of Three Thousand (\$3,000.00 Dollars. [1\*]

## III.

That the said Gold Creek flows from the mountain range east of Juneau, the greater part of its course being through a canyon, out of which it flows at or near the boundary of said Casey-Shattuck Addition, across which it flows into Gastineau Channel on the south side thereof. That the watershed of said stream is very precipitous, so that in time of heavy rains to which the country is subject there are periods of floods or high water in the stream. That plaintiffs' said lot was situated on the south side of said stream and a short distance therefrom, and a short distance below the point where

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\*Page-number appearing at foot of page of original certified Transcript of Record.



said stream emerges from its canyon; and from said canyon to a point some distance below plaintiffs' said lot, the stream was confined by banks sufficiently high to contain the stream at all stages of the water even the highest floods. That a short distance below plaintiffs' said lot the stream at times of high water overflowed the banks and spread over a part of the said Casey-Shattuck Addition and thereby allowed a free outlet to said waters to the said channel. That in said natural condition plaintiffs' said lot was far above any danger of flood from said stream at any and all stages of the water.

#### IV.

That long subsequent to the sale of said lot to plaintiffs and long after they had built said house and improved the property, defendants, for the purpose of reclaiming a part of said Casey-Shattuck Addition and making the same marketable, to wit, that part thereof formerly subject to overflows, built a dam or bulkhead across said stream at a point about opposite plaintiffs' said lot, and from said dam, and a point opposite and across the stream therefrom, constructed bulkheads of logs and loose stone to Gastineau Channel at a point to the southeast, thus changing the course of said stream and deflecting it [2] sharply to the southeast in a curve around the west and south side of plaintiffs' said lot. That the new channel thus constructed was sufficient to carry the waters of said creek at ordinary stages of the stream, but was too shallow and too narrow and wholly insufficient to carry the waters at times of floods such as ordinar-

ily occur therein at times of heavy rains, so the stream as dammed and changed in its course by defendants became a danger and menace to plaintiffs' said property, of all of which defendants were fully warned and apprised before said structures were built, and that said structures and changes in said channel of said stream would inevitably cause damage to plaintiffs' and other property, which would otherwise be entirely safe at the first high water occurring after their completion.

Plaintiffs further allege that defendants were grossly negligent in the planning and construction of said flume in this: Said flume was planned and laid out with a depth of only five feet, and a width of thirty feet, or thereabouts, from its head to a point near its mouth, thereby being given a capacity of not more than one-half the capacity of the original creek channel it was to replace, and which creek channel defendants well knew, or could have known, was frequently taxed to its full capacity by flood waters coming down said creek, and at a point near its mouth and thence to the point of discharge said flume was narrowed to a width of twenty-five feet, thereby still further decreasing its capacity, and furthermore rendering it extremely likely, if not inevitable, that in time of high water the usual debris coming down said creek at such times would become choked at said narrows and thereby entirely prevent the flow of the waters through said flume at all. That the construction of said flume was too flimsy, weak, and insufficient to hold together during flood waters in said creek,

but on the contrary was such [3] as to permit the waters to undermine the walls of logs and wash them out into the flume and release the waters upon and against the adjacent ground.

## V.

That on or about September 26th, 1918, there occurred one of the usual periodical heavy rains to which the vicinity is subject, which caused the waters of Gold Creek to rise and, pouring out of the canyon above on to the said Casey-Shattuck Addition and being unable to flow through the natural, original channel of the said creek and the flat because of the dam, was forced through and down said flume or artificial channel, and the said waters being laden with debris, and because of the narrowing of the said flume or artificial channel at or near its mouth, said channel became choked with said debris so as to prevent the greater part of the said flood waters escaping through said channel; and by reason of the obstruction caused by said choking and of the insufficient, flimsy and weak construction of the walls of said flume or artificial channel, a part of the logs and material out of which the walls of said channel were constructed gave way and were washed out into the said flume or artificial channel, which caused the waters and the full force of the current to be deflected and carry away a part of the easterly wall of said flume or channel adjacent to the plaintiff's said property and the deflection of said current being continued the same impinged upon, undermined, and washed



away the plaintiffs' said house, together with its contents and furnishings, and also washed away the earth and soil upon the lot itself so that a new and deep channel of the said Gold Creek now occupies the space formerly occupied by said lot and house, and the lot and house, together with its contents and furnishings were thereby completely destroyed. That the said damage and destruction was caused solely by the [4] *by the* construction of said dam and bulkheads in the negligent, defluctive and insufficient manner aforesaid and would not have occurred had the said flume or artificial channel *had* not been built by defendants. That the value of the property so destroyed and the damage to the lot aggregates the full sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE plaintiff pray judgment for the said sum of Five Thousand (\$5,000.00) Dollars, with eight per cent (8%) interest per annum thereon from the said 26th day of September, 1918, and all costs herein incurred.

J. H. COBB,  
Attorney for Plaintiffs.

United States of America,  
Territory of Alaska,  
Division Number One,—ss.

O. Eikland, being first duly sworn, on oath deposes and says:

I am one of the plaintiffs above named; I have read the above and foregoing amended complaint,

know the contents thereof and the same is true as I verily believe.

O. EIKLAND.

Subscribed and sworn to before me this 2d day of June, 1921.

[Notary Seal]

J. H. COBB,

Notary Public for the Territory of Alaska, Residing at Juneau.

(My commission expires June 8th, 1923.)

Service of the above and foregoing complaint admitted this 3d day of June, 1921.

H. L. FAULKNER.

By S. CRANGLE,

Attorney for Defendants.

Filed in the District Court, District of Alaska, First Division. Jun. 3, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [5]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,

Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,

Defendants.

**Answer to Amended Complaint.**

Come now the above-named defendants, and in answer to the amended complaint of the plaintiffs on file herein, admit, deny and allege as follows:

**I.**

Defendants admit the allegations contained in Paragraph Number One of said amended complaint.

**II.**

Referring to the allegations contained in Paragraph Number Two of said amended complaint, defendants admit that the plaintiff A. Eikland purchased and owned Lot No. 6, in Block No. 209, and admit all the other allegations contained therein, except that the value of the dwelling-house and said lot was \$3,000.00, which said allegation defendants deny, and allege that the value of said dwelling-house was not more than \$1500.00.

**III.**

Referring to the allegations contained in Paragraph Number Three of said amended complaint, defendants admit that Gold Creek flows from the mountain range east of Juneau into Gastineau channel across said Casey-Shattuck Addition; admit that there are periods of floods in said stream; admit that the lot mentioned in said amended complaint was situated on the southeast side of said stream; admit that said lot was far above any danger of floods from said [6] stream during periods of ordinary high water in said



stream; and deny each and every other allegation contained in said paragraph.

#### IV.

Referring to the allegations contained in Paragraph Number Four of said amended complaint, defendants deny that they built a dam or bulkhead across said stream at any point; deny that they deflected the course of said stream; admit that they built bulkheads upon the banks of said stream; and allege that the channel of said stream was of sufficient capacity, and said bulkheads were so constructed that said channel could carry the waters of said stream at all times, including freshets and all periods of high water; deny that defendants were negligent in the planning and construction of said bulkheads, referred to in said amended complaint as a flume; deny that the channel after the construction of said bulkheads had a capacity of not more than one-half the capacity of the original creek channel; deny that the capacity of said channel was diminished by defendants in any particular; deny that the channel was narrowed near its mouth; and deny each and every other allegation therein contained.

#### V.

Referring to the allegations contained in Paragraph Five of said amended complaint, defendants admit that on September 26, 1918, a flood occurred, due to heavy and unusual rains, which caused the waters of Gold Creek to rise, and that said flood

damaged the property of the plaintiffs, and in this connection, defendants allege that said flood and said heavy rains were unusual, unprecedented, extraordinary, and such as had never before occurred in said vicinity, and such as could not have been foreseen by the defendants, or anyone else; and the defendants deny that the damage to plaintiffs property was caused by any act of defendants, but was due solely to an Act [7] of God, as afore-said; and defendants deny that the value of the property damaged was \$5,000.00, and deny that the damage to the said lot and house aggregated the full sum of \$5,000.00, or any other sum in excess of \$1500.00; and defendants deny each and every other allegation contained in said paragraph.

WHEREFORE, defendants pray that this action be dismissed and that they recover from plaintiffs their costs and disbursements herein.

H. L. FAULKNER,  
Attorney for Defendants.

United States of America,  
Territory of Alaska,—ss.

I, Allen Shattuck, being first duly sworn, depose and say: That I am one of the defendants mentioned in the foregoing answer; that I make this answer for and on behalf of all the defendants; that I have read the said answer and know its contents, and that the facts stated therein are true and correct as I verily believe.

ALLEN SHATTUCK.

Subscribed and sworn to before me this 13th day of October, 1921.

H. L. FAULKNER,  
Notary Public for Alaska.

My commission expires Nov. 14, 1922.

Copy received Oct. 15, 1921.

J. H. COBB,  
Atty. for Plaintiffs.

Filed in the District Court, District of Alaska,  
First Division. Oct. 15, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [8]

---

In the District Court for Alaska, Division Number  
One at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,  
Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,  
Defendants.

### **Reply.**

Now come the plaintiffs, by their attorney, and for reply to the affirmative defenses alleged in the amended answer, deny the same, and they especially deny that the damages to plaintiffs alleged in the



complaint were due to the act of God, or to any other cause except those alleged in the complaint.

J. H. COBB,

Attorney for Plaintiffs.

United States of America,  
Territory of Alaska,—ss.

O. Eikland, being first duly sworn, on oath deposes and says: I am one of the plaintiffs above named. I have heard read the above and foregoing reply, and the same is true as I verily believe.

O. EIKLAND.

Subscribed and sworn to before me this 17th day of October, 1921.

[Notary Seal]

J. H. COBB,

Notary Public for Alaska.

My commission expires June 8, 1923.

Filed in the District Court, District of Alaska,  
First Division. Oct. 20, 1921. J. W. Bell, Clerk.  
By ———, Deputy. [9]

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND and O. EIKLAND,

Plaintiffs,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

Defendants.

**Judgment.**

The above-entitled cause having come on regularly for trial on November 13, 1922, the plaintiffs being represented by J. H. Cobb and James Wickersham and the defendants by H. L. Faulkner, and both parties having announced that they were ready for trial, and a jury having been duly and regularly impaneled and sworn to try the issues in the above-entitled cause, and evidence having been introduced on behalf of both plaintiffs and defendants, and the jury having retired to consider of their verdict, and having returned into court on November 16, 1922, their verdict as follows:

“We, the jury, duly and regularly empanelled and sworn to try the issues in the above-entitled cause do find for the defendants.

J. W. LEIVERS,  
Foreman.”

and said verdict having been duly filed herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by their complaint herein, and that the defendants recover from the plaintiffs their costs and disbursements incurred in said cause to be taxed by the clerk.

Dated this 18th day of November, 1922.

THOS. M. REED,  
District Judge.

Filed in the District Court, District of Alaska,

First Division. Nov. 18, 1922. John H. Dunn,  
Clerk. By ————, Deputy.

Entered Court Journal No. R., page 444. [10]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

### **Bill of Exceptions.**

BE IT REMEMBERED that on the trial of the  
above-entitled and numbered cause, the following  
proceedings were had:

The plaintiffs to maintain the issues on their part,  
introduced the following evidence:

First. The evidence of B. D. STEWART taken  
on the former trial, March 24th, 1919, as follows:

#### **Testimony of B. D. Stewart, for Plaintiffs.**

##### **Direct Examination.**

(By Mr. COBB.)

Q. State your name. A. B. D. Stewart.

Q. You reside in Juneau, Mr. Stewart?

A. Yes.



(Testimony of B. D. Stewart.)

Q. What is your occupation?

A. Mining engineer and mineral surveyor.

Q. You are an engineer and surveyor?

A. Yes.

Q. I will ask you if you have recently made any measurements, platting and survey of the ground of the Casey-Shattuck Addition to Juneau, lying across the stream know as Gold Creek?

A. I have.

Q. The last few days      A. Yes.

Q. I will ask you if you have made a plat of that?

A. I did.

Q. From actual work done on the ground?

A. Yes. [11]

Q. Actual measurements made?

A. Actual measurements on the ground.

Q. I will ask you if this is the plat?      A. Yes.

Q. Now, I will ask you to step down here, Mr. Stewart, and explain that map to the jury. Perhaps I had better first offer it in evidence.

Mr. COBB.—We will offer that in evidence.

Q. (By Mr. FAULKNER.) Mr. Stewart, you made this recently?

A. Just a day or two ago. (12—1)

Mr. FAULKNER.—No objection.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "A.")

The COURT.—It is offered as a plat showing the present conditions?

Mr. COBB.—What can be shown on a plat.

Q. (By Mr. COBB.) Now, Mr. Stewart, step

(Testimony of B. D. Stewart.)

down here where the jury can see it. Now when you made that survey where did you begin your work?

A. I began my work at a point marked on the plat No. 1, on the northwest side of 10th Street.

Q. Did you locate that point on the ground?

A. Yes.

Q. That is on the lot of what block?

A. On the southerly line of block 208, lot No. 8.

Q. Now, the map, so far as the blocks and lots are concerned, does that correspond with the official survey of the Casey-Shattuck Addition?

A. Yes, the blocks and lots are indicated on the map by a tracing from that official map, and my survey is tied to that by locating block corners on the ground.

Q. Now, the place marked "ribbed Channel," you have the westerly side of that indicated by a heavy alternate black [12] and white line—what does that indicate?

A. That indicates the cribbing of the cribbed channel which is still in place.

Q. That is still in place? A. Yes.

Q. Now, on the westerly side of the creek above that there is another heavy line, alternate black and white—what does that indicate?

A. That indicates also a piece of cribbing which is still in place.

Q. That is, it is there now, and do you know whether it has been put in since or not?

A. I don't know anything about that, no, but I

(Testimony of B. D. Stewart.)

know that the (13—2) southerly 60 feet of it has sagged down. I say it is in place—it is approximately in line with the old cribbing on the channel.

Q. Now, the place on the map here marked “Channel filled with stumps, boulders and debris”; what does that indicate?

A. That indicates the line of the original cribbed channel.

Q. Any of that left in there?

A. No, that is obliterated with the exception of a section at the lower end opposite and lying east of the School Reserve, block 220. At that point the tops of the piles and the sheathing on the side of the piles show at the surface. The channel itself is full of stumps, boulders and sand, but the very top of the channel is shown, and that channel indicated on the map is as it is on the ground.

Q. State, now, if you took any measurements to ascertain the dimensions, cross-section of the flume or artificial channel? A. I did, yes.

Q. Whereabouts were they taken?

A. At a point on the map marked by green line, lying at the [13] intersection of the cribbed channel with 10th Street, and marked C-D in green ink.

Q. What did you find its dimensions to be?

A. 150 square feet was the area of the cross-section—30 feet by 5, practically.

Q. I hand you a paper here and ask if you made that? A. I did, yes.



(Testimony of B. D. Stewart.)

Q. From a survey and actual work on the ground?

A. Yes.

Mr. COBB.—We will offer that in evidence.

Mr. FAULKNER.—We object to that. There is no testimony showing the witness' knowledge of any old original channel. It is marked "Cross-section of original channel." The witness is not qualified to testify that he knows anything about the original channel. (14—3)

Mr. COBB.—Just as he found it on the ground.

The COURT.—I do not think there is any objection to it provided it is sufficiently definite as to what he is talking about. It is what he considers the old channel on the ground, which he saw. Do you mean that this is a cross-section of some part of that map, Plaintiff's Exhibit "A"?

The WITNESS.—Yes; indicated in the same way on the map as it is here on the cross-section.

The COURT.—The objection is overruled because he has testified what the map is, and now he says that it is a cross-section of the map.

Mr. FAULKNER.—That is the point, yes. If that is a cross-section of this portion marked on the map we have no objection.

(Whereupon said cross-section was received in evidence and marked Plaintiff's Exhibit "B.")

Q. Now, Mr. Stewart, you say you measured the capacity of the flume, the original channel, at the point near 10th Street [14] marked with a green line on there. What did you find its capacity to be?

(Testimony of B. D. Stewart.)

A. The width was very close to 30 feet, and the depth averaged 5 feet.

Q. A cross-section of it, then would contain 150 feet?    A. 150 square feet.

Q. Did you measure it at any other place?

A. The cribbed channel?

Q. Yes, the cribbed channel.

A. I measured the width of it, yes—not the depth, however.

Q. Whereabouts did you measure that?

A. Down where the top of the flume shows, opposite the School Reserve.

Q. What was the width of it at that point?

A. 25 feet.

Q. It narrowed 5 feet?    A. Yes. (15—4)

Q. Did you measure its depth at that point?

A. I couldn't; it is full of boulders and things.

Q. It is filled up and you could not measure its depth. Now, from a point at or near the intersection of B Street and 10th Street, I will ask you if on the surface there is a channel, old channel, going from there down to the bay, as indicated on that map?    A. There is.

Q. Just below there is there any other old channel lying off to the west, or right as you go down stream?    A. Yes.

Q. Did you measure those?

A. I took a cross-section of the channel above where it branches.

Q. What was the cross-section there?

A. The area was 230 square feet.

(Testimony of B. D. Stewart.)

Q. What was the width? A. 125 feet.

Q. Now, did you measure it at any other place, the width of it—the width of the channel?

A. Yes.

Q. Whereabouts?

A. I measured it in numerous places. One place, for instance, [15] where the channel which I have marked on the map “Original channel” crosses 9th Street, between blocks 218 and 219—62 feet wide at that point.

Q. At the point here where it crosses 9th Street?

A. It is marked on the map; yes.

Q. Sixty-two feet wide there. Did you take the elevations that indicated the drop of the ground?

A. Yes, from 11th Street down to the bay I did. I am speaking of the cribbed channel.

Q. You took the elevations of the cribbed channel. What is the drop or grade?

A. It is approximately 2 per cent. (16—5)

Q. Where is that?

A. That is from 11th Street down to the channel—the intersection of 11th Street.

Q. That is 2 feet in a hundred?

A. About that. The bed is irregular and of course it depends on just where that point is taken in the channel, but as near as I could get, it is about 2 per cent.

Q. Did you take the elevations in the old channel? A. Yes.

Q. What is that? A. About the same.

Q. About 2 per cent?

(Testimony of B. D. Stewart.)

A. Yes—some sections are steeper and some are not so steep, but the average is about the same.

Q. Now, the cribbing you have in place there on the westerly side, as indicated on that map—that is all in place?

A. It is in place and intact, yes.

Q. Does that show the water or stream in the old channel?

A. There is no water flowing down there now, of course.

Q. Mr. Stewart, was this map and the objects on it drawn to scale?     A. Yes.

Q. What does this indicate that you have marked “New Channel,” [16] across block 209 and the next block northwesterly of it?

A. That is a new channel which was formed by the flood.

Q. Now, did you find a small corner—a few square feet—of lot 6 in block 209, plaintiff’s lot, still intact?     A. Yes.

Q. What is there on it?     A. A fence post.

Q. Did you take the elevation of that?

A. Yes.

Q. As above what?

A. As above the channel there.

Q. How high did you find it to be? (17—6)

A. About 6 feet.

The COURT.—Above the bottom of the channel?

The WITNESS.—Yes, about the bed of the channel.



(Testimony of B. D. Stewart.)

Q. (By Mr. COBB.) Where is the bulk of the water in the creek now running?

A. It is pretty well frozen over now—I couldn't say—I think it is running down this channel right here (indicating).

Q. A large part of it has been shut off by this bulkhead from coming down the new channel?

A. Yes.

Q. Now, the space that you have marked "Washed out area, covered with boulders and debris," just tell the jury briefly what there is in there.

A. Well, there are boulders and rocks.

Q. What about the elevation of it above the bottom of the channel?

A. It is several feet,—nearly all of that area is several feet above the channel.

Q. And the channel is cut deeper?

A. Several feet deeper—I should say it would be 5 or 6 feet deeper.

Q. Now, along the easterly border of what you have marked the "New Channel," on the north side of 10th Street down past 9th Street, what is there along that easterly side of that channel there?

A. There is a cut bank along that side of the channel. [17]

Q. About 6 feet high?

A. Well, it runs 2 or 3 feet high I should say, at 9th Street—the southerly side of 9th Street; and you notice on the map there is a point marked "House"—that is where the house is overhanging the edge of the bank. Between that house and 10th

(Testimony of B. D. Stewart.)

Street the bank is in the neighborhood of 10 feet, I should say, above the bed of the channel.

Q. That is, the cut bank is about 10 feet high.

A. Yes.

Q. Now, there is only one matter on this I believe you have not (18—7) testified to. Referring now to Exhibit “B,” you have figured out here 230 square feet and 150 square feet—what were those put on there for?

A. It is merely a graphic representation of the area of the two cross-sections so that they can be more easily compared.

Q. Now, as an engineer and surveyor, Mr. Stewart, can you say what would be the conditions—supposing a flood that would practically fill the cribbed channel as it existed to its capacity and show a rise of 6 inches more—in fact, over the top of it—in other words, where it would take a channel 6 inches higher, under the same width, to carry the flood waters, would there be any difference in the amount of the rise in the same flood in the new channel?

A. Yes, on account of the difference in the width. In other words, the same amount of water would be distributed over a much wider space.

Q. The same flood would by no means be so high? A. No.

Q. How would you arrive at the difference, in proportion to the width?

A. The area—the area and the width.

(Testimony of B. D. Stewart.)

Q. In other words, you would get the area by multiplying the width by the depth. A. Yes.

Q. Now, say that this channel, this natural channel, had a [18] width of 60 feet, and the cribbed channel had a width of 30 feet, its full capacity, and there was sufficient flood to raise up in the cribbed channel one foot above that, what would be the rise in the natural channel? A. 6 inches.

Q. Just half?

A. Yes; that is, allowing the same grade, and the other things being equal.

Q. How did you find that? (19—8)

A. The grade is about the same—practically the same.

Mr. COBB.—You may cross-examine.

#### Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stewart, will you indicate here on this plat as nearly as you can where the Gold Creek bridge is situated—about where—in what direction?

A. I would say about there (indicating).

Q. That is not indicated on the plat? A. No.

Q. Of course the stream is not indicated there as it comes out under the Gold Creek bridge?

A. It is more easterly and westerly.

Q. What is the difference in altitude between the mouth of the channel down here and where it would come out under the Gold Creek bridge?

A. Why, from what I know of the elevation on this section of the map, I would say at least 50

(Testimony of B. D. Stewart.)

feet—50 or 60 feet.

Q. Now, Mr. Stewart, you have marked there a channel which you call on the map "Original Channel." Now, you say that plat was made within the last few days? A. Yes, sir.

Q. Were you here at the time of the flood, September 26, 1918? A. No, I was not.

Q. How long after that did you see the ground that you have shown on the plat? [19]

A. I didn't see it until the first of March of this year.

Q. And you say the channels were considerably filled with snow and ice at this time?

A. No, there is a covering of about 3 inches of ice there now. You can see the water running through in places.

Q. Then, since you were not here, you don't know whether this was the original channel or a channel caused by the flood? (20—9)

A. Yes, I have been down there before.

Q. Did you make any measurements of it before?

A. No. I will state however, that channel does not show any recent signs of being cut out.

Q. It has not been changed any?

A. Not to amount to anything; there are still alders and bushes in there.

Q. Now, you have given us the measurement of the channel at this point—how deep is the channel at that point?

A. I didn't take the cross-section—that is merely the horizontal distance between the banks.



(Testimony of B. D. Stewart.)

Q. Now, you gave the position of a post on Mr. Eikland's lot which you say is still standing, and you said that it is about 6 feet above the bed of the creek?   A. About that.

Q. That is 6 feet above the bed of the new channel?   A. Yes, sir.

Q. What portion of that new channel?

A. Opposite the fence post.

Q. Did you take the elevation of the fence post from the nearest point to the bed of the new channel?

A. It is not an exact right angle, but very close to it.

Q. Now, as a matter of fact, Mr. Stewart, this that you have marked "New Channel" is considerably steeper next to the fence post than it is at any other portion, isn't it?   A. Deeper?

Q. Yes.   A. No. [20]

Q. Isn't the water still flowing in there now?

A. I wouldn't say as to that—I didn't notice.

Q. You don't know whether there is any difference in the depth there or not?

A. Any difference in the depth? (21—10)

Q. The new channel is deeper as you come to the fence post?   A. You mean next to the cut?

Q. Yes, next to the cut it is deeper.

A. I didn't notice that.

Q. But this measurement of 6 feet is from the fence post to the nearest point below the bank?

A. I had it set there at some point—I couldn't say just now where it is—I couldn't say exactly,

(Testimony of B. D. Stewart.)

but I know it is right near the fence post—you might say opposite the fence post.

Q. Now, you say, Mr. Stewart, that this depicts the bulkhead that is still across that channel?

A. Yes.

Q. Does that extend clear across that channel as it is shown there?

A. As nearly as I could identify the channel it is still across.

Q. And it only extends across what you have marked as the original channel?

A. Yes. I will state, too, about that original channel—that follows approximately the same line as being the course of Gold Creek as on those official plats of the Casey-Shattuck Addition, except that it is a different width.

Mr. FAULKNER.—Except it is a different measurement. That is all.

Redirect Examination.

(By Mr. COBB.)

Q. You have put on this plat the actual width as you found it on the ground? A. Yes. [21]

Q. And in the official plat, from which you put in the lots and blocks, the old original course of Gold Creek is indicated on there?

A. It is, yes.

Q. And it is substantially the same as the other except the full width is not shown. A. Yes.

Mr. COBB.—That is all.

(Witness excused.) (22—11)

Second. The testimony of A. EIKLAND taken on the former trial March 24th, 1919, as follows:

**Testimony of A. Eikland, for Plaintiffs.**

Direct Examination.

(By Mr. COBB.)

Q. State your name.      A. A. Eikland.

Q. Are you one of the plaintiffs in this case?

A. Yes, sir.

Q. Who is O. Eikland, the other plaintiff?

A. O. Eikland is my brother.

Q. You and your brother bought lot 6 in block 309 of the Casey-Shattuck Addition to Juneau from the defendants in this case in what year?

A. 1913.

Q. What time in the year?

A. We entered into a contract—I don't know when it was dated, but we started to build there the middle of April.

Q. It was early in the year, then—I don't care anything about the exact date.

A. It was early in the year—in the spring.

Q. Did you go down and look at this lot?

A. We did.

Q. What sort of a lot did you find it to be? What was on it?

A. It had a number of stumps there—perhaps more than a dozen stumps on the lot, and there were a number in the alley back of the lot. They were

(Testimony of A. Eikland.)

from small stumps up to perhaps 6 feet in diameter—spruce stumps.

Q. Now, did you notice at that time Gold Creek flowing past there, near it? A. Yes.

Q. Where is Gold Creek from this lot? Which direction does it [22] pass it? (23—12)

A. I beg pardon—I didn't catch it.

Q. From your lot does it pass east or west or how? A. It passes west of it.

Q. Now, how high above the level of the channel of Gold Creek was this lot—the surface of it?

A. Approximately 21 feet.

Q. Now, was there any indication of there ever being a stream across it, or flood waters going over it, or anything of that kind?

A. No, I didn't see any; there was grass growing, and small trees and brush growing over the lot in places; some of it had no trees on it, but there was grass all over the lot; there hadn't been no indication of a flood for a long time.

Q. Which way does your lot slope. Does it slope towards the channel or from the channel?

A. It sloped toward sea level—towards the channel in a southerly direction.

Q. About how far away was Gold Creek from your lot. Come to this plat and point out to the jury where your lot is.

A. It is lot 6—that is the lot (indicating).

Q. The corner lot, on the corner of B Street and 9th Street? A. Yes, sir.

Q. The northeasterly corner, is that right?



(Testimony of A. Eikland.)

A. You are mixed up, no—northwesterly.

Q. On the north side of B Street? A. Yes.

Q. And on the easterly side of 9th Street?

A. That would be it.

Q. Now, point out to the jury where Gold Creek ran at that time.

A. Gold Creek ran down this channel here marked "Original Channel." There was a very little water at that time—hardly any, because you could walk across with low shoes at any time—there [23] was hardly any water.

Q. Early in the year? (24—13)

A. At this time when the frost hadn't gotten out of the ground yet there was hardly any water, like it is now. You could cross the creek there, from one rock to another, you could cross with low shoes—ordinary thin shoes, you could cross without getting your feet wet, but you would have to be careful.

Q. Did it run down then what is marked "Original Channel"? A. Yes.

Q. Was there any other channel, old channel, running off towards the west, that is marked there "Old Channel"?

A. There was an old channel that appeared to be dry for some time going down towards the baseball ground, marked here "Old Channel"; approximately, as near as I can see on the map run down there, but there hadn't been no water, it seemed like, for some time, because it had formed a little small growth of alder and grass, but there was

(Testimony of A. Eikland.)

some gravel, showing that there had been water some years back.

Q. Now, I will ask you to point out to the jury about how far towards Gold Creek and up the line of B Street the high ground extended. Was all of your lot on high ground?

A. All of my lot was high ground, and the ground came across approximately, well, I would judge, three-fourths of a lot on this corner, and approximately a third here, or something like that. There is an alley here—12 foot alley—which is shown here. The high ground started approximately over here,  $\frac{2}{3}$  or maybe  $\frac{1}{2}$  a lot from the alley, and the lot directly behind—there was 5 lots there on that street—it cut approximately across here. I always judged from the line marked fence, as being the next lot, of course, on account of there being only four lots here, and the lots behind the line was 10 feet off this way from the corner of our lot, so I suppose the corner [24] of my lot in a direct line there would be two-thirds of a lot directly back of my fence, on this side (25—14) of the fence, and there would be approximately a third of a lot right next to B Street. These lots in here was the only 50 feet lots in the tract—the rest of them was 40 feet.

Q. Now, then, the surface of B Street between block 209 and the next block southwest,—I don't know what that is numbered—

A. 213.

(Testimony of A. Eikland.)

Q. 213, how was that compared with the level of your lot?

A. The level of B Street opposite my lot at this corner was a little lower, because that is filled in in the front approximately 2 feet. Originally it was level with the street, but it dropped off a little bit right there, and I filled that in. My lot was approximately level all over the lot—perhaps a little higher in this corner.

Q. How far across B Street did the high ground extend?

A. The high ground extended all over the next block.

Q. Block 213?

A. Yes, and over to the edge of the flume. It wasn't a flume at that time, but over in here—some place along that lot, where Gilbert's house stood, to the corner in the opposite block, across the street, and it was approximately the same level—all level ground along here.

Q. Along the surface there where the flume was afterward put, was there any old channel—a small channel?     A. There was a small channel there.

Q. Carried water at high water?

A. At high water.

Q. Now, that was the condition at the time you bought, you say. Was there any change made in reference to the channel of the stream after that?

A. In the fall of 1914 Casey and Shattuck started to build this bulkhead that shows on there. [25]

Q. Did you have any conversation with any of

(Testimony of A. Eikland.)

them about it at that time? (26—15)

A. Practically the only one I knew at that time to do any business with, or the only one I ever did any business with was Henry Shattuck. I always dealt through him, and when I had any deal to make I went to him, and I did protest to Henry Shattuck himself about putting that flume towards my property—told him it would endanger my property and I was opposed to it.

Q. What did he say about it?

A. Just the way he spoke I couldn't remember, but he stated they had a right to build that, and he was going to construct that channel, and when they got through with it it was going to improve the property down in the flats.

Q. And they went ahead and built it?

A. They went ahead and built it.

Q. Was the whole thing finished in 1914?

A. No, sir, they worked through the winter and the spring.

Q. Was it finished by the summer of 1915?

A. It was finished by the time the high water started. As near as I can recollect, they had to hurry with the last on account of the water rising.

Q. That was towards spring when the water began to run?     A. Yes.

Q. Then as I understand, in the spring of 1915, they had the new channel constructed, did they?

A. I don't know whether it was constructed by spring, but it was constructed between spring and the time the water got high.



(Testimony of A. Eikland.)

Q. You don't know just when it was finished?

A. No, I don't know just when it was finished.

Q. Now, indicate on this map to the jury—point out where [26] the new channel ran.

A. The confined channel?

Q. Yes.

A. The confined channel ran the way it is indicated on this map—ran through here, down to Willoughby Avenue—down to this point (indicating). (27—16)

Q. It had an elbow at block 213, as indicated there, just opposite your property? A. Yes, sir.

Q. Now, was it constructed across the old channel, as the creek originally flowed at the time you bought?

A. There was a bulkhead of logs constructed—a double row of logs constructed, with cross-pieces every 8 or 10 feet stuck in with drift bolts. The piles were placed lengthways along the side of the creek, and were placed approximately 4 feet apart, and the space in between was filled in with gravel and butts of piles they sawed off and threw in.

Q. What formed the inside wall of the new channel?

A. These logs, with the butts of the cross-pieces sticking out into the channel.

Q. And it was very much like—looked like the wall of a log cabin, did it?

A. Looked very much the same thing as the wall of a log cabin.

Q. Now, in the fall of the year 1915 did they have

(Testimony of A. Eikland.)

any high water.

A. There was a good freshet in August—about the middle of August, 1915.

Q. You don't fix the exact date?     A. I do not.

Q. Anything happen to the flume then?

A. The flume busted right directly above the 9th Street bridge, and all the way down.

Q. Just point out to the jury where it broke there. [27]

A. It broke through there, right directly above 9th Street, at this point here (indicating); some of the water escaped through down here, and the flume was suspended in the air not less than two or three feet where the water ran under it.

Q. That is the westerly wall of it.

A. The westerly wall.

Q. Was undermined and the water escaped. I will ask you if there is a slope out here, towards the old channel—towards the (28—17) south and southwest so the water escaped?

A. There was slope on the top of the bank. The top of the bank was higher than the ground below there down towards the old channel—it is the slope of 9th Street, as everybody is acquainted with—there was quite a slope down from there.

Q. At that time did they have the same kind of an embankment on the east side of the new channel?     A. They did.

Q. Did that hold?     A. That held.

Q. That flood did not damage you any at all?

A. It did not.

(Testimony of A. Eikland.)

Q. How did that compare with the flood of 1918?

A. Well, I don't consider that flood as large as this.

Q. It wasn't quite as high—it was a good big freshet, however?     A. Yes.

Q. After it broke out in 1915 did the defendants do anything toward putting it back. What was done about that by the defendants, if anything?

A. They repaired it with slabs they hauled up from the sawmill—long slabs, the way they come from the saw—they repaired it, and those were stuck down to close the holes under it, and then they throwed in some cement sacks filled with sand, and put some behind the flume, and put some rocks up directly across the 9th Street bridge so as to strengthen the flume that had washed out, and closed up the gap. [28]

Q. And during the years of 1916 and 1917, then, was there any high water to speak of?

A. There was no high water to mention.

Q. Those were dry years?

A. Yes—they were not dry years, but there was no large amount of water coming at one time.

Q. Now, in 1918—were you out there on the 26th day of September, 1918? (29—18)     A. I was.

Q. You were watching the flood waters?

A. Yes.

Q. What time did you begin watching them in the morning?

A. It was nine o'clock when I got there. I was working and I had business on Willoughby Avenue,

(Testimony of A. Eikland.)

and I noticed the people was congregating there, and I investigated, and I went up to my house to see what was going on.

Q. At that time were the waters up to your lot?

A. No, sir.

Q. Where was the water going at that time?

A. It was going—most of it was going down the flume at 9 o'clock when I got there, and shortly after it began to spill over on the side—both sides.

Q. Did any part of the flume go out that day, and if so, where was the first place where the embankment on the side of the flume gave way?

A. The first place that I noticed giving way was approximately at this point. The flume broke at this point, or very near here, and half of it come out this way, and the logs sticking out like they were, one end swung around like this, and this swung in the flume and dammed across the flume.

Q. That was the east side?

A. The east side of the flume broke at that point.

Q. After that what happened?

A. The flow of water was shot up against the bank on this side, and dug out the bank like a hydraulic turned against it at that time, and deposited sand up against the flume on this side—  
[29] what was left of it.

Q. What did that flood do to your property there?

A. The water swung against the bank there dug away the high ground back of my lot, dug out the alley and began to dig out my lot, dug it out



(Testimony of A. Eikland.)

gradually, undermined it, and tore the house away.  
(30—19)

Q. How much of your lot is left there now?

A. There is 5 feet along the fence one way, and 5 feet the other way—there would be a triangle, and the sides of the triangle would be 5 feet.

Q. That is all of the lot that is left?

A. That is all of the lot that is left.

Q. Is there any of your house left?      A. No, sir.

Q. What became of it?

A. Carried down the creek; it stood there for awhile—it was all twisted and bent, and another house came down and smashed it, and part of it was took away and part of it is down there now—pieces of it.

Q. About what time did your house go.

A. I cannot tell.

Q. As near as you can recall?

A. Some time that afternoon about 2 o'clock—I was too excited to notice the time.

Q. You were there all the time up to the time your house went?      A. I was, from 9 o'clock.

Q. I will ask if at any time the surface of the flood waters rose as high as the surface of your lot?

A. No, sir.

Q. The lot, then, was destroyed by this undermining of it?

A. It was destroyed by this undermining.

Q. Very well. Just go ahead and explain to the jury what you (31—20) saw and what happened. Tell it just as you saw it there.

(Testimony of A. Eikland.)

A. Well, the flume broke at the point mentioned, approximately here at this point, and part of the logs in this flume doubled [30] out in this direction, across like that, and part were too long to swing completely around, and so they were lodged at an angle about like that—they were too long to be permitted to swing clear around, and the debris came down and deposited in these logs that stayed in this direction, and caused the water to run out of the flume on this side; and this side was intact, and the water washed up against the bank here, and kept digging and digging, and the channel shifted over and dug out all the ground back here.

Q. What prevented the flood waters from going down the old original channel and escaping into the sea?

A. The flume across this channel here; those logs there prevented that because it didn't break.

Q. I will ask you if that was strengthened by the defendants in 1915—that part of it?

A. It was strengthened very close to this point; I don't know whether it was strengthened right directly at that point there—it was strengthened this way, and there was a number of rocks behind.

Q. About what was the length of the logs that came out of the flume embankment as compared with the width of the flume itself?

A. Well, the logs coming out of there was more than twice the width of the flume—they were very long logs, and there was logs there—I mentioned

(Testimony of A. Eikland.)

at the time they put them in—I admired the length of those piles, and the straightness of them, because I am interested in that work, and there was some 85 feet long in that flume, because I measured them.

Q. Did you notice at any time during the high water there the condition of the flume below 9th Street—from there on out to the sea? (32—21)

A. After the flood or before?

Q. During and after the flood. [31]

A. Well, it filled up with debris and started to choke up down by Willoughby Avenue.

Q. Where is Willoughby Avenue? It is not shown here—it is out on the tide flats.

A. I should judge this is Willoughby Avenue here. There is the native hospital standing, and this is Willoughby Avenue—should be approximately here.

Q. It is on the tide flats?

A. It is on the tide flats.

Q. You say it choked up down there?

A. Started to choke up down there, and the water was flowing here, and the flume choked up from there on up to the bridge, and it was filled up full of debris, rocks, stumps and parts of buildings.

Q. Is it full now?     A. It is full now—level.

Q. Now, from what you saw there, if that flume had not been built there, could those flood waters have escaped to the sea down the old channel without injuring you?

(Testimony of A. Eikland.)

A. In my opinion they would.

Q. Is that obvious from looking at it?

A. Sure.

Q. I hand you a photograph and ask you if that correctly represents (38—27) the condition of the flume down there prior to the flood, close to the creek?

A. It does.

Q. Just step down here a minute and point out to the jury where your house was.

A. Right there (indicating).

Q. Is the old original creek channel where the creek flowed shown there?

A. Here is shown the old creek channel running through here, down at about 8th Street.

Q. Show the other old channel to the west of that.

A. Here is the old one you spoke about—that has not been running any for some time—running down towards the old ball [32] grounds.

Q. Do you know when that picture was taken?

A. From the houses that are there and the things that are there, it has been taken between April 1915 and October, 1915.

Mr. COBB.—I think I will have the photographer here to tell just exactly when it was taken. I will offer it in evidence at this time, and call the photographer later.

Mr. FAULKNER.—All right.

The COURT.—That is offered in evidence as showing what?



(Testimony of A. Eikland.)

Mr. COBB.—Showing the condition of the flat prior to the flood.

The COURT.—How long prior?

Mr. FAULKNER.—1915, the time it was finished.

The COURT.—It will be admitted.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "D.")

Q. Now, I hand you another photograph and ask you what that represents?

A. This represents the same piece of ground, or nearly the same piece of ground, after the flood—I don't know how long after, but not very long after—before the city put in their repair work across here, so that it could not have been over, approximately, ten days after—between a couple of days and ten days after. (39—28)

Q. Does that show correctly the way things looked down there at that time. A. It does.

Q. Step down here a minute. I will ask you about where on this photograph your house stood before it was washed away?

A. There is the corner post that the surveyor took his dimension on, and the small picket fence running approximately 5 feet, might be more and might be less—that little corner of ground. That house stood 21 feet from this fence over this way, and about 7 feet from this B Street, and about 24 feet from 9th Street, is where the house stood.  
[33]

Q. Now, indicate on here about where the flume first went out on the east side.

(Testimony of A. Eikland.)

A. It shows here, where the pile is still shown here. Part of the piles swung around and the other part swung in the flume, coming across like a wing dam, causing the water to bank over here. At first it started here, and washed up against this part of the bulkhead.

Q. And kept on working over?

A. Yes; this house floated in, and this high ground, showing there was deep water at that time.

Q. Now, on this plat here there is indicated a line of bulkhead across the upper end of the new channel—when was that put in?

A. It was put in in the first part of October. It was constructed there by the Street Commissioner, to work the water off from the native hospital. They were going to have it repaired and the water was running down so they couldn't excavate there, and they constructed this to carry the water away from the hospital.

Q. Turned it down this channel?

A. Turned it down this channel, and turned it down along here—turned it down this way.  
(40—29)

Q. And this bulkhead, shown on the plat, Plaintiff's Exhibit "A," as crossing the new channel, that Mr. Stewart found there at this time, that has been built since that?

A. It has been—the greater part of it from up there has been put in since the flood and has been destroyed since, also.

Q. What destroyed it?

(Testimony of A. Eikland.)

A. A little freshet came along there just after *the* completed it and partly wrecked it again.

Q. Partly wrecked it?

A. They put up a little temporary affair thinking there would [34] not be any water any more for a year, and a little freshet came along and wiped away the affair they had in there, and the water still went out around the hospital.

Mr. COBB.—We offer that in evidence.

Mr. FAULKNER.—No objection.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "E.")

Q. You are familiar with all of the ground from your place on out to the beach, indicated at the lower end of the plat here—are you? A. I am.

Q. I will ask you to tell the jury which way the ground slopes from your house on out towards the beach—what is the general slope of the country?

A. Well, the ground slopes down this way, and this way, approximately that angle—about this way.

Q. Practically towards the southwest? (41—30)

A. Yes, it would be the southwest.

Q. Was there any ground southwesterly from your lot that was as high as your lot was?

A. No, there wasn't.

Q. How long have you been in this part of Alaska, Mr. Eikland? A. Six years.

Q. Where did you come from here?

A. Seattle.

Q. You had never been in Alaska before?

(Testimony of A. Eikland.)

A. Yes.

Q. You had lived in Alaska before that?

A. About six months.

Q. When was that?     A. 1906.

Q. You were here about six months in 1906, and went back to Seattle, and came back in the spring of 1913?

A. I wasn't here in 1906—I was in Haines—Fort Seward.

Q. You never lived in Juneau prior to the spring of 1913?     A. No, sir.

Q. You have lived here continuously ever since?

A. Yes.

Q. I think you testified yesterday that you bought this lot [35] some time in the spring of 1913?     A. Yes, sir.

Q. At that time were there any buildings to speak of—any settlement on the Casey-Shattuck flats?

A. There wasn't any residences, but only a small house in the same block—I don't remember the lot—it was on the opposite corner, facing 9th Street, in the same block.

Q. All the property then, south and southwesterly of your lot was unoccupied, no buildings on it?

A. There was no buildings whatever that I remember southwest, or anywheres in the flats.

Q. During the time you have been here you have seen freshets in (42—31) Gold Creek prior to September, 1918?     A. Yes, sir.

Q. When was the first one that you saw there?



(Testimony of A. Eikland.)

A. The first one that I saw was in August, 1913.

Q. Was that as high as the one that occurred in September, 1918?

A. Well, I wouldn't be able to state whether it was or not; it was in the middle of the night when it was at its height and we couldn't see just what the water was—there was quite a freshet—quite a lot of water coming down the creek at that time, but it was in the night and it was dark.

Q. Which way did that water escape?

A. It escaped down through where the old channel was.

Q. There had been no change in the original channel at that time?

A. There wasn't no change

Q. Did that damage your property any?

A. No, sir.

Q. When was the next one you saw?

A. The next one I saw was in October, 1913.

Q. Just describe that freshet to the jury.

A. Well, there was a good heavy rainfall for about three days, and there had been previous to that some fresh snow in the mountains, about halfway down the mountain side, and we got one of [36] those warm winds we occasionally get here, and this snow all melted, and with the rain that came down at the same time there was an awful amount of water in Gold Creek—I think there was more water in Gold Creek then than there was last fall—September, 1918.

(Testimony of A. Eikland.)

Q. Did that flood do any damage to your property?    A. No, sir.

Q. Which way did it escape?

A. It escaped—the biggest part of it escaped down where it did in August, and possibly a part of it went down through by the power-house there. There was kind of a dry creek there, and it flooded a good part of that dry creek bed all through there. (43—32)

Q. Southwesterly from your house, down the old channel, in that direction?    A. It did.

Q. Was there any property at all down there at that time to be damaged by it, outside of yours?

A. There was no property that I know of—there was no houses at that time; there was a few tents scattered around the flats, but there was no property to be damaged that I know of because there was no buildings there at that time.

Q. Did that flood make any impression upon the high ground bordering the stream, the old original channel, on the side opposite your property?

A. It possibly did a little digging there on the east side, up there towards 10th Street, up in that vicinity, and around there—I didn't pay a great deal of attention to it, but there was possibly some excavation done by the creek there.

Q. About how far away from your property was the nearest point of the flood waters on that occasion?

A. Well, it was possibly 20 feet, or something

(Testimony of A. Eikland.)

like that, in the nearest place where the water was from the back end of the lot—approximately something like that. [37]

Q. Now, I believe you testified yesterday that this flume was built in the winter of 1914 and '15.

A. Yes, sir.

Q. And the next high water you said was in 1915? A. It was.

Q. And the lower part of the flume broke and escaped—has there been any freshets to speak of since 1914 up to September, 1918?

A. There wasn't enough freshet since that time that we noticed it. There was freshets, but there wasn't anything that came down the flume to speak of.

Q. Nothing like the freshets of 1913 or 1918?

A: No, there wasn't.

Q. You know nothing of your own knowledge about the condition of (44—33) the floods prior to 1913? A. I do not.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Eikland, do you know who owned that property out there at the time you went and settled on it? A. Where I built the house?

Q. Yes, the whole tract.

A. They—Casey and Shattuck owned it.

Q. Do you know in what proportion they owned the respective interests?

A. I was told Casey owned half, and the

(Testimony of A. Eikland.)

Shattuck brothers owned the other half together, one quarter each.

Q. Henry Shattuck owned a quarter?

A. So I understood.

Q. And he was the man to whom you complained at the time the flume was built? A. Yes, sir.

Q. Did you say anything to Mr. Casey?

A. I did not.

Q. Do you know where Mr. Shattuck is now?

A. I do not. [38]

Q. Do you know whether he is in town?

A. I understand he is out of town; I don't know where he is.

Q. You didn't say anything to Mr. Casey?

A. I did not.

Q. Did you say anything to Mr. Casey or Mr. Allen Shattuck or to Mr. Henry Shattuck about getting the contract to build the flume yourself?

A. I did not.

Q. Not a word? A. No, sir. (45—34)

Q. Didn't you make a bid on it? A. I did not.

Q. You say that when you went out there the morning of the 26th of September, you went up to your home, and it was about 9 o'clock, was it?

A. About 9 o'clock.

Q. And at that time the water was spilling over the flume? A. Some.

Q. Was there any water on the outside of the flume flowing down the bed of the creek, or flowing down outside of the flume?



(Testimony of A. Eikland.)

A. Sure, it had spilled over and was running down outside, naturally.

Q. Was there any other crack there outside of the flume?

A. I didn't notice any—it spilled over and was running down on both sides—there wasn't very much at that time.

Q. Whatever water there was was coming from the flume?

A. It did; there was water leaking through it—it always did leak through—it wasn't water-tight—water always seeped through it.

Q. There was not very much water outside at that time?     A. Yes, sir.

Q. What time did the flume give way, did you say?     A. Between 10 and 11 I should say.

Q. Some time after you went home?

A. Yes, some time after.

Q. And after that the waters continued to rise, did they?     A. It did.

Q. Did you notice anything else—that any other part of the flume [39] broke—did you happen to notice?     A. I did not.

Q. You just noticed this one place?

A. I noticed the flume breaking up there, and after that there was such a lot of water we couldn't see just where it broke, but (46—35) there was so much water rushing through there all of a sudden that I surmised that is where it broke.

Q. That is just what happened—you could not see just where it did break?

(Testimony of A. Eikland.)

A. No, we couldn't see where it pulled out, but we saw the water come through all of a sudden.

Q. You knew the water started to come through there? A. Yes, approximately at 10th Street.

Q. That is on this side of the flume, opposite your house, about 10th Street? A. Yes, sir.

Q. That is the first break you noticed?

A. Yes, sir.

Q. You were there before any of this flume was built? A. Yes, sir.

Q. Was this the only channel there was there before the flume was built?

A. Yes, sir; this was the only channel I noticed when I came out here, although I stated a while ago in the flood of 1913, in October, there was such a volume of water that it filled all this space, and possibly some of it flowed down—I don't know just where that would be, and part flowed down by the power-house, where there had been water from time to time at high water—a big part of the water run down there.

Q. There was no creek bed at that time in this portion that is marked on here "Cribbed Channel"?

A. Not that I noticed. There was here at this point, because this is where it originally was—this is where it broke across the cribbed channel at that time.

Q. But from the intersection of the cribbed channel with what [40] you have marked "Original Channel" down towards the beach there was no creek-bed at all?

(Testimony of A. Eikland.)

A. There was no creek-bed, except as I stated, dry places where the water in extreme high water would run down through. (47—36)

Q. That bulkhead, then, was built practically on dry land? A. It was.

Q. And the creek was diverted over the dry land?

A. Yes.

Q. You stated your lot there was 21 feet above the bed of the creek?

A. I understood above sea level—that is what I stated.

Q. You say it was 21 feet above sea level?

A. Yes, sir.

Q. But you didn't say how far it was above the bed of this creek? A. I did not.

Q. You don't know that? A. No, I do not.

Q. Do you know how far the surface of the lot that remains is above the bottom of the creek as it now is?

A. No, I don't know anything about it, except Stewart, the surveyor, said it was 6 feet. I haven't measured it—I haven't used instruments down.

Q. In this space marked on the map "Washed out area covered with boulders and debris," describe to the jury what is there.

A. All that shows there is what we call coarse gravel, and boulders—might be 6 inches in diameter—the biggest part that shows there is boulders and gravel—I think that is all I noticed laying there—there might be a few plants that was deposited by the water there.

(Testimony of A. Eikland.)

Q. There are no trees or growth of any kind covering that—it is all bare?

A. I have an impression that there is some laying up here, very close—must be about here—some that fell down from here—I don't know where it come from.

Q. Do you know anything about this cribbed bulkhead that [41] is marked on this plat, that extends across what is marked as the New Channel,—do you know whether that extends clear across the top of that channel? (48—37)

A. I do not; Steve Raymond had a gang there extending this across there to keep the water from running down and going on to the Native Hospital property, and I know for the reason that Hawkesworth employed me to repair the hospital, and Hawkesworth was working in harmony with the Street Committee to get them to work this water off down there so he could excavate under the hospital.

Q. Where is that hospital?

A. It must be about here.

Q. What block is that?

A. 220, and the native school is erected on this part of the lot, and the hospital on this part, and the water was running through there, about here, and running all around so we couldn't excavate there, and he extended this part of the flume across in this direction, for temporary work, to keep the water from going down this way, and he diverted the water at this point, down through



(Testimony of A. Eikland.)

here, to keep it from going through here.

Q. Now, Mr. Eikland, how far is it, approximately, from where your house was to the Gold Creek bridge that Mr. Stewart says is not marked on this plat—approximately about how far?

A. That is pretty hard for me to give.

Q. Would it be 100 or 500 feet?

A. It must be 500 feet—possibly more—maybe 600 or 700.

Q. How far would it be from where your house was to tide water down at Willoughby Avenue?

A. That must be about the same distance—about 500 feet.

Q. Your house was about halfway?

A. About halfway.

Q. Where is Willoughby Avenue on that map?

A. It must be about here.

Q. It is not shown on that plat?      A. No.

Q. How is Willoughby Avenue constructed there?  
(49—38) [42]

A. Constructed on piles, with caps on top, and planks on top of them.

Q. And at the mouth of his part here that is marked "Original Channel," of this creek that flows on down past the hospital, approximately about how high would the caps be from the beach—the caps of the piling on which the street is built?

A. Over at the original channel?

Q. Yes, and coming all the way along here?

A. It varies a great deal; Mr. Casey piled in a lot of property there and planked it over and it

(Testimony of A. Eikland.)

is still standing, and it is filled in a great deal now—it must have been approximately 4 or 5 feet around this point—it was more over here. I walked under there several times—it must have been 7 feet approximately—I walked under there before the flood.

Q. About 6 or 7 feet?     A. It must be.

Q. And were the piles pretty thick in there?

A. Mostly about 10 feet centers—approximately 10 feet centers.

Q. You stated this portion of the channel, I think—either you or Mr. Stewart stated—is filled with stumps, boulders and debris, the lower end of it, down towards Willoughby Avenue—you have seen that, have you?     A. Yes.

Q. Will you describe to the jury what is in there to the best of your recollection.

A. Stumps, boulders, logs, timbers, pieces of concrete, household goods.

Q. Pieces of concrete?     A. Yes, sir.

Q. Do you know where they came from?

A. I do not.

Q. Are there a good many stumps in there?

A. There are not a good many stumps in there—there are large pieces of blocks, sand, household goods. (50—39)

Q. How is it down here at what is marked “Original Channel”?     A. There is nothing. [43]

Q. Nothing then west of the flume?

A. Not much; there is at a certain point here there is some brush.

(Testimony of A. Eikland.)

Q. But there is nothing on the westerly side of the hospital that was filled in by the flood?

A. No, very little there.

Q. Now, Mr. Eikland, you stated that your lot is approximately halfway between Willoughby Avenue and the Gold Creek bridge?

A. Approximately.

Q. What is the difference in the grade, if any, between your house and Willoughby Avenue and your house and the Gold Creek bridge?

A. Well, the grade there might probably be,—oh, Gold Creek is steeper.

Q. Than it is further down?

A. Yes, than it is further down.

Q. Now, when your house went out on this day, was that the first house that went out—do you remember whose house was the first to go out?

A. Yes.

Q. Whose was it?      A. N. G. Nelson's.

Q. Do you know a house belonging to a man named Ingman?      A. Yes, sir.

Q. Did it go out before yours?      A. Yes, sir.

Q. As a matter of fact when that house went out it floated over and hit your house, didn't it?

A. It did.

Q. And it knocked your house over into the water?

A. My house must have been pretty shaky by the time the (51—40) other houses hit it, but it struck it.

Q. When it struck it what happened?

(Testimony of A. Eikland.)

A. It leaned over for awhile, and after while it shot over on the other side, and my house went out also.

Q. They both went at the same time?

A. Yes, sir.

Q. How was the stream at that time? Was it sluggish and slow? [44]

A. No, sir, very strong current at that time.

Q. Do you know where Ingman's house is now?

A. He moved it.

Q. It did not collapse, did it?

A. Not completely; he repaired it and is living in it now. (52-41)

Q. You say they strengthened the flume?

A. They did.

Q. In what direction—where was that?

A. They strengthened it from the 9th Street bridge up, on what I call the lower side.

Q. On the side next to your house?

A. No, sir; on the opposite side.

Q. Who did that?

A. Casey superintended the work.

Q. Do you know who built that flume originally?

A. The man that built it? (55-44)

Q. Yes.

A. I wasn't personally acquainted with him; I called him Ole—that's all I did know, but I heard his name was Opsahl.

Q. Opsahl?

A. Ole was the only name I knew him by.

Q. Do you know how he built it?



(Testimony of A. Eikland.)

A. I saw him construct it.

Q. No, I mean under what conditions?

A. I do not.

Q. Who owned the property on which the flume was built, do you know that? A. I don't know.

Q. Who owns the bulk of the property out there, Mr. Eikland? A. I don't know.

Q. Well, there is a good deal of property out there that is not built on, isn't there? A. Yes.

Q. You don't know who owns that?

A. I do not. [45]

Q. Do you know whether Mr. Casey owns a house down there or not? A. Yes, sir.

Q. Do you know where that house is?

A. Yes, sir.

Q. Can you point out on this plat about where it is?

A. About where it is? I don't know the lot number—it would be over in this block, facing here—some place here, probably.

Q. Do you know whether it is one of those lots there? A. It must be one of those lots there.

Q. Block what? A. 214.

Q. Do you know where his son owns a house there? A. I do. (56—45)

Q. Casey, Jr.

A. It must be in this block, 208.

Q. Do you know whether Mr. Shattuck owned any property out there, either Mr. Allen Shattuck or Mr. Henry Shattuck? A. I do not.

Q. You think in the flood of 1913—October, 1913

(Testimony of A. Eikland.)

—there was more water in the creek than there was in September, 1918?   A. I think there was.

Q. And it was very much the same kind of a flood?   A. Yes.

Q. Did you observe pretty well the conditions and the results of that flood?   A. I did.

Q. In October, 1913, was there any damage done anywhere by that flood?

A. I don't know whether there was or not. As I stated, there was no houses there—I don't know, there may have been pieces of ground washed out in places—I didn't notice any—there was no damage that I know of.

Q. Do you know what the rainfall was at that time?   A. I do not. [46]

Q. Do you know what the rainfall was in September, 1918?   A. No, sir.

Q. Do you know of any other damage that was done in any other direction in Juneau and vicinity in October, 1913?

A. No; there were slides, I know, in different places.

Q. You know pretty well what damage was done in 1918, the time you lost your house?

A. I don't—slides the same as—

Q. You observed the conditions, didn't you?

A. Damage out in the flats I know.

Q. And there was damage in other places too?

A. No, I don't know that.

Q. Do you know whether the Gold Creek bridge remained intact. (57—46)   A. It floated out.

(Testimony of A. Eikland.)

Q. Did it float out in 1813?      A. It did.

Q. And it floated out in 1918?      A. Yes, sir.

Q. Where did it go in 1913?

A. A large part of it lodged directly west of my property.

Q. Did you notice any concrete that came down in 1913?      A. No, I did not.

Q. In 1918, Mr. Eikland, as a matter of fact, wasn't there a big flume that broke and came down Gold Creek from way up in the basin?

A. I don't know.

Q. Wasn't there a great deal of damage done on the basin road in 1918?

A. Yes, there was a number of slides.

Q. As a matter of fact wasn't the road almost destroyed?

A. I don't know—I haven't been up—there was slides there, but I don't know that amount of the damage.

Q. You have been in town since then?

A. I have.

Q. Did you observe the damage done over on what is known as Swede Hill?      A. I did. [47]

Q. What happened over there?

A. There was a slide and several houses was removed from their foundations by the slide.

Q. Several destroyed?      A. Yes.

Q. Any waterfalls come down there that you know of?      A. I don't know. (58—47)

Q. You don't know anything about that?

A. I don't know anything about that.

(Testimony of A. Eikland.)

Q. Do you know of any slides on the Salmon Creek road?

A. I don't know anything about that.

Mr. COBB.—I think I shall object to that. It is not proper cross-examination—it is going into their case.

Mr. FAULKNER.—It is cross-examination on whether the flood of 1913 was as great as the one in 1918.

The COURT.—The objection is overruled.

Q. Do you know of any damage done on the Salmon Creek road in 1913?

A. I do not; I was a stranger in the country at that time, and I didn't pay much attention to those things. There may have been lots of damage done but I didn't pay much attention to it.

Q. Did you observe any in 1918? A. I did.

Q. Did you observe any on the road between Juneau and Thane? A. I did not.

Q. Did you observe any damage as a result of the flood on the hill know as Chicken Ridge in Juneau in 1913? A. I did not.

Q. Did you observe any in 1918? A. I did not.

Q. You don't know whether there were any slides up there or not? A. I do not.

Q. But you did observe the slides and the damage that was done on what is known as Swede Hill in 1918?

A. I saw the wreckage the next day—it wasn't the next day— [48] it was several days after.

Q. You didn't observe any damage done there in



(Testimony of A. Eikland.)

1913? A. I did not.

Mr. FAULKNER.—That is all. (59—48)

Redirect Examination.

(By Mr. COBB.)

Q. Mr. Eikland, as a matter of fact, you have heard of slides frequently on what they call Swede Hill, haven't you, every year?

Mr. FAULKNER.—I object to what he heard of.

The COURT.—I think I will overrule the objection. It is all on the question of a comparison of the two floods—still, I don't know about the question of whether he heard—

Q. You know of your own knowledge that in town there have been slides on Swede Hill every year since you have been here?

A. I have heard from conversations about slides all over this country.

Q. It is common knowledge that slides occur on that hill? A. Yes, sir.

Q. Ever after slight rains. Now, Mr. Eikland, was there as much building on Swede Hill in 1913 as there was in 1918? A. No, not so much.

Q. Nothing like as much property down in the flats built up as there has since been built up either?

A. There was not.

Q. Now, Mr. Faulkner asked you about the two houses that went out before yours, Mr. Nelson's and Mr. Ingman's?

A. He didn't ask about two houses—he asked about one.

Q. Where did those houses come from that he

(Testimony of A. Eikland.)

asked you about?

A. I can point it out on the map.

Q. All right, point it out on the map.

A. One was the house built by George Gilbert and sold to N. G. Nelson, on lot 10, block 215; and the smaller house built by [49] N. G. Nelson was erected on the triangle next to his other house—the part of the lot next up against the flume.

Q. Was it one of those houses that struck yours?

A. No, sir. (60—49)

Q. Where did the house that struck yours come from? A. It was on this lot.

Q. What lot is that? A. Lot 3, block 209.

Q. That was carried down and struck your house?

A. Yes.

Q. Counsel asked you about your house, the dimensions and so on—what was the foundation of it?

A. Concrete.

Q. A concrete foundation?

A. Yes, sir; concrete floor.

Q. What sort of floors did it have in it?

A. Concrete.

Q. Above the concrete—the room floors.

A. It had a shiplap floor first, a sub-floor, and oak floors in part of the house and fir in the balance.

Q. Oak floors in how many rooms?

A. Just the one large front room had an oak floor in it.

Q. The rest of it was fir? A. Yes, sir.

Q. Now, counsel asked you about the concrete which you saw in the flume—pieces of broken con-

(Testimony of A. Eikland.)

crete. When your house was undermined did this concrete foundation fall in and give way, of your house?

A. I think a part of the concrete wall was broken in; after the dirt washed out it didn't have much support; a great pile of the dirt in the rear was washed away, and the concrete didn't have the strength to hold against the timbers that came down ramming it.

Q. And these pieces of concrete that you saw in the flume—you don't know whether they came from that or some other foundation? A. I do not.

Mr. COBB.—That is all. (61—50)

#### Recross-examination.

(By Mr. FAULKNER.) [50]

Q. Do you know, Mr. Eikland, that there was a concrete flume, or a flume with concrete sides up in the Gold Creek basin? A. Yes, sir; I do.

Q. You know it was there before the flood. Do you know whether it was there after the flood?

A. I do not.

Mr. FAULKNER.—That is all.

(Witness excused.) (62—51)

Third. Testimony of E. R. SMITH, taken on former trial, March 24th, 1919, as follows:

#### **Testimony of E. R. Smith, for Plaintiffs.**

##### Direct Examination.

(By Mr. COBB.)

Q. State your name. A. E. R. Smith.

(Testimony of E. R. Smith.)

Q. Where do you live, Mr. Smith?

A. 9th Street.

Q. In what town?      A. In Juneau.

Q. How long have you lived in Juneau?

A. Three years approximately—almost three years, lacking a few days.

Q. How long have you lived in Alaska?

A. Three years—the same length of time.

Q. Were you in Juneau during the month of September, 1918?      A. Yes, sir.

Q. What business were you engaged in?

A. Lineman for the telephone company.

Q. In that business your duties require you to look out after the lines of the company, do they?

A. Yes, sir.

Q. Do you remember the freshet on September 26th?      A. Yes, sir.

Q. Were you down on the flats through which Gold Creek flows that day?      A. Yes, sir.

Q. About what time did you go out, Mr. Smith?

A. About a quarter past eight, the first time.

Q. What was your purpose in going out there?

A. Had some telephone lines in trouble.

Q. When you went down there where did you first go to? (77—66) [51]

A. Right by the native hospital.

Q. Is that near the south end of the flume that was constructed to carry that creek?

A. Yes; it was between Willoughby Avenue and the hospital—pretty close to it.



(Testimony of E. R. Smith.)

Q. What was the condition of the water at that time?

A. Why, it was running over the flume enough to knock the poles down, and that is how I happened to be there. The water was going over the top of the flume enough that it washed out a couple of poles and the lines fell down—that is how I happened to go down there at that time.

Q. Where did you notice it was coming from?

A. It was coming through all along there—it was almost as deep on one side as it was on the other.

Q. That was about 8 o'clock in the morning?

A. Shortly after eight.

Q. Just point out to the jury where you were.

A. Right along in here some place—just this side of Willoughby Avenue, back of those houses.

Q. At that time was there any indication of the lower end of the flume choking up that you could see?

A. Running very smoothly at that time except it was so full it was running over a little bit.

Q. Handling the bulk of the water?

A. Yes, sir.

Q. Now, later in the day—do you know where Mr. Eikland's property was—his house that stood there? A. Yes, sir.

Q. Were you up about that part of the ground during the day? A. Yes, sir.

Q. About what time, Mr. Eikland, did you go up there?

A. About half-past ten, I believe, in the morning,

(Testimony of E. R. Smith.)

that I was there—something about that time—I don't remember exactly (78—67) between ten o'clock and noon, anyway. [52]

Q. What was the condition of the water then?

A. Getting a little higher all the time.

Q. At that time was there any indication of danger to Mr. Eikland's house that you could see?

A. Well, it looked kind of doubtful about that time.

Q. Just go ahead, Mr. Smith, and tell the jury,—how long were you there, first?

A. I was there all the rest of the day, practically all day.

Q. I want you to tell the jury in your own way what you saw in reference to the waters, and what they did.

A. Well, it was about half-past eight or nine o'clock, and I reported here at the court,—I was on the jury at that time, and as soon as we were excused, which was 10 o'clock or shortly after, I went back down again, and at that time I believe the bridge was just about out.

Q. Which bridge?

A. The 9th Street bridge, and the two houses.

Q. That 9th Street bridge was the bridge over the flume?

A. Yes, the bridge over the flume, and that was out; and I don't remember right now whether it was one or two of those little yellow houses of Nelson's right next that was gone out or not; and at that time I went up around by Gold Creek bridge

(Testimony of E. R. Smith.)

the upper bridge to the other side of the creek, and the water was coming through there and injuring some of the poles; and from that I came back around, and I don't know just exactly what time it was—probably noon—somewhere along in there, or a little after—and at that time it looked like Mr. Eikland's house was about to go, so we had several wires and cables going across there, and in case his house would go it would catch on them and perhaps tear the whole line out, so I was trying to get those in the clear—

Q. Up on the poles? (79—68)

A. Up on the poles, yes, sir, trying to get those in the clear [53] so in case his house should go it would not tear out the whole line, and from there I got a pretty good grand-stand view of the whole thing.

Q. Did you notice the embankment on the east side of the creek above Mr. Eikland's house about that time?

A. I don't know that I paid particular attention to the bank except the water was running over.

Q. This bank that was constructed there?

A. The flume.

Q. The east side of the flume?

A. The flume was about full at that time, running over, and I think that is about the time it broke up there, clogged up and caused the water to run over.

Q. It did break up there somewhere on the east side? A. Why, yes, choked up.

(Testimony of E. R. Smith.)

Q. When it broke, what did you observe, if anything, in reference to the current, the main body of water, then being diverted and coming over towards Mr. Eikland's property?

A. Well, it just jack-knifed up, closed up and formed sort of an eddy in there, and that started to eat in the bank and kept gradually getting worse as more water came down.

Q. What was it choked it up in the first place,—the main flume, you mean?     A. Yes.

Q. Do you know what choked it up?

A. Dirt, piling, boulders, stumps, and the flume choked itself up.

Q. Was that done by the logs out of the flume?

A. Yes, I believe they were in there.

Q. Were you there at the time Mr. Eikland's house went out?     A. Yes, sir.

Q. I will ask you if at any time during the high waters there the water ever got as high as the level of his lot?

A. No, I don't think it got as high as the level of his lot. (80—69) [54]

Q. It just ate out the bank?

A. It just ate out the bank—it just kept chewing off the bank—kept caving off all the time.

Q. Do you know where the main channel of the creek was as it originally stood?

A. Yes, I know about where it was—I have been through there.

Q. Is there an embankment across that on the far side of the road?     A. Yes, sir.



(Testimony of E. R. Smith.)

Q. Acts as a dam, does it, to prevent the water from going down the main channel?

A. Constructed to carry the water out the main flume.

Q. Did that part of the embankment hold?

A. Yes, that held.

Q. I will ask you what prevented the waters from escaping down the old channel, the original channel of the creek instead of coming over towards Mr. Eikland's property?

A. The flume evidently was the only thing there that could stop it from going on.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Smith, you came over to Mr. Eikland's house about what time?

A. Oh, I don't know just exactly the time—I think about ten o'clock.

Q. Was that before you came to the courthouse or after you left?

A. I was there both before and after.

Q. What time did you come to the courthouse?

A. I don't remember; I expect I reported at 10 o'clock; I was on the regular panel of the petit jury at that time.

Q. And when you first went out to Gold Creek the water was running in the flume smoothly?  
[55]

A. Yes,—you have reference to the first time I

(Testimony of E. R. Smith.)

went down there in the morning shortly after 8 o'clock?

Q. Yes. (81—70)

A. Yes, it was running smooth except it was running over and leaking out.

Q. The flume was full?

A. I couldn't say whether it was full or within a foot or two feet of the top—it was high enough to notice, all right—taken out a couple of our poles.

Q. Did you notice when the flume broke up about Mr. Eikland's house?

A. I couldn't say just exactly what time it did break—there was so much excitement I couldn't tell much about it.

Q. There was a good deal of water there, wasn't there? A. Yes, there was a good deal of water.

Q. And it was pretty hard to see what did break first.

A. You might say it was—I didn't keep track of just exactly how it broke.

Q. There were a good many logs and stumps coming down?

A. Yes, debris coming down there.

Q. Came from different directions?

A. Yes, sir.

Q. *Do* it is pretty hard to tell just what did happen at that time?

A. Well, it was pretty hard to tell what happened any more than you could take a look and see just how it choked up and started eating around in there.

(Testimony of E. R. Smith.)

Q. You couldn't tell just what was the cause of it? A. No, the water was too deep.

Q. Now, Mr. Smith, you came here in 1916?

A. Yes, 1916.

Q. And the flume was built then, wasn't it?

A. Yes, sir.

Mr. FAULKNER.—That is all.

(Witness excused.) (82—71) [56]

Fourth. The testimony of C. W. STEARNS taken on former trial, as follows:

**Testimony of C. W. Stearns, for Plaintiffs.**

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. C. W. Stearns.

Q. Where do you live, Mr. Stearns?

A. At the foot of 9th Street.

Q. In Juneau? A. In Juneau, yes, sir.

Q. Foot of 9th Street, in the Casey-Shattuck addition? A. No, on the tide flats.

Q. Out on the Casey-Shattuck addition?

A. Yes.

Q. How long have you resided in Juneau?

A. Approximately three years.

Q. Was that your first home in Alaska?

A. No.

Q. Where did you live before that?

A. Previous to living there I lived at Ketchikan, Douglas and Thane.

Q. How long have you lived in Alaska alto-

(Testimony of C. W. Stearns.)

gether? A. About 9 years.

Q. Were you in Juneau on the 26th day of last September? A. I was.

Q. Where were you living at that time—the same place? A. At the same place.

Q. Do you remember the freshet that occurred at that time? A. I do.

Q. Do you know where Mr. Eikland's property is? A. I do.

Q. Were you up there that day.

A. I was. (83—72)

Q. Whereabouts were you, as near as you can recall?

A. Well, I was at Mr. Eikland's house—in fact, I helped to move a kitchen range out of the kitchen.

Q. About what time of the day did you first go there?

A. Why, approximately about 9:30, I would judge.

Q. What was the condition of the water at that time—the creek? [57]

A. Why, at that time the creek had broken out of its boundaries on the right-hand side looking up the stream.

Q. That is on the easterly side?

A. Yes; somewhere about, I should judge, 200 feet above Mr. Eikland's property.

Q. How was it behaving? Just describe it to the jury as you saw it, Mr. Stearns, as well as you can.

A. Well, as I observed it at that time the debris



(Testimony of C. W. Stearns.)

had formed a dam at the 9th Street bridge which caused an eddy, causing the water to swing over to that side, and above there the water had broken over or washed out a portion of the riprap or cribbing that had been used as a part of that flume and it was rapidly eating away into that bank back of Mr. Eikland's property. Mr. Eikland's property at that time was not in danger, as near as I can remember—I would not state definitely in regard to that point, of course, but to the best of my knowledge I would not think the property was in danger at that time, although it was eating in along that bank there. I left there shortly after that and went back down on Willoughby Avenue, and later returned—I should judge about 11 o'clock, or between 11 and 12, and helped to move some of Mr. Eikland's belongings from the house, which we piled in the street. But by this time the water had undercut the house on the northwest corner, to the extent that they deemed the house was unsafe for us to remain in there, as I should judge one-third of the house was completely undermined, and the sagging of that corner, you know, naturally made the rest of the house weak, and the floors were springing, and the timbers were (84—73) rather inclined to move up and down as you walked about in the house, so we deemed it was unsafe to stay in there any longer, although there was small articles of furniture and bric-a-brac that was brought out after that.

Q. About what time did the house go, as near

(Testimony of C. W. Stearns.)

as you can recall? [58]

A. Why, I should judge, as near as I can remember, between one and two o'clock.

Q. Now, you are familiar with those flats, are you—been over them lots of times? A. Quite.

Q. Now, from Mr. Eikland's house towards the southwest, towards the channel, is there a considerable slope to the ground, or not—considerable grade to it towards the channel?

A. Yes; that is, off of his lot; there was no grade to amount to anything on his lot. His lot was filled up level.

Q. Did the waters at any time ever come as high as the surface of his lot?

A. Not that I know of. At the time I was in there I would judge that the water was at least—the last time I was in the house, as I mentioned, when the house was unsafe, it was fully 3 feet, I should judge from the top of the ground down to the water level.

Q. It was just cutting into the bank down below?

A. Yes.

Q. Carrying it away. What, if anything, prevented the escape of those waters towards the southwest—towards the channel?

A. Well, it was the cribbing and riprap along on the west side of the flume, undoubtedly.

Q. What did that dam up, if anything?

A. Well, it caught a great deal of debris, roots, logs, that had floated out above there where the break was made.

(Testimony of C. W. Stearns.)

Q. Were there any original creek channels leading out down there through which the water could have escaped towards the southwest? (85—74)

A. Yes, there was the channel that the water was diverted from on building this flume.

Q. And the flood could not escape down there?

A. No, sir.

Q. Had you ever been on Mr. Eikland's property or noticed it [59] before this?

A. Yes, I had.

Q. Just describe to the jury what was the character of the ground—what indication of growth or permanency this ground showed—were there any stumps on it? A. Not that I noticed at the time.

Q. You did not see it in its original condition?

A. No.

Q. When did you first see it?

A. I didn't see it until 1916—the winter or spring of 1916.

Q. You don't know what the condition was when he bought it, then?

A. No, I couldn't say what the original condition of the lot was; I only saw it after it was improved.

Q. This was one of the highest lots, as far as the surface of the ground is concerned, in the flat—much higher than a good many of the other lots that are improved below that?

A. Yes, it is higher than a good many of the lots that have been improved below that.

Mr. COBB.—You may cross-examine. (86—75)

(Testimony of C. W. Stearns.)

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stearns, you went down to Mr. Eikland's house at what time that morning, about 9 o'clock?

A. About 9 or 9:30.

Q. How long did you stay there?

A. Why, approximately, I should judge, half an hour or such a matter.

Q. And then you returned down to Willoughby Avenue?     A. Yes.

Q. What portion of Willoughby Avenue?

A. Why, at the point of outlet of this flume, or approximately so—on the avenue just above the outlet of the flume.

Q. Near the hospital?     A. Yes.

Q. And you remained there how long? [60]

A. Well, I presume until somewhere near 11 o'clock.

Q. Then where did you go?

A. Went back up to Mr. Eikland's place.

Q. And remained there until the house went?

A. Yes, I was in that vicinity; I was on the street there—I wasn't in Mr. Eikland's premises all the time I was there. I was in the house and assisted what I could in removing this furniture—I was around there, I should judge, for an hour or so.

Q. Did you see the flume break?

A. No, I did not. I will amend my answer however, to the fact that I did see logs float up there,—as to any specific break—

Q. (Interrupting.) Float up where?



(Testimony of C. W. Stearns.)

A. At or near the point as I mentioned a few minutes ago, about 200 feet back of Mr. Eikland's property—I saw some of the riprap come loose. (87—76)

Q. Where would that be? Will you come down and indicate on this map?

A. I would judge that it was in about this point—there somewhere.

Q. Where did those go?

A. Well, I saw, I think it was two of them—I might possibly have saw more—I remember distinctly seeing two of them—one of them came up and crossed there and remained there for some time—I know it remained there; and one of them came up and swung up, the end around there, and finally swung around here, and went up against the bridge crossing 9th Street.

Q. What time was that?

A. That was between 11 and 12 o'clock.

Q. That wasn't very near Mr. Eikland's property was it? Do you know where Mr. Eikland's property was, on this lot 6?

A. It was right in here—right back of Mr. Eikland's property. [61]

Q. And they remained in the flume?

A. One of them remained in the flume there for some time across the current, which was following the flume.

Q. Where was the other one?

A. The other one went down against the bridge that is across 9th Street—caught on the bridge

(Testimony of C. W. Stearns.)

across there.

Q. The flume at that time was not broken though?    A. Yes, the flume had broken.

Q. Where?

A. I couldn't say as to how many places were broken in the flume at that time, from the fact that the only indication I had of the flume being broken was the timber coming out of there—it was impossible for me to see through the water and see what the effect was there.

Q. You didn't see it break? In other words, it was impossible for you to see where the break really occurred?

A. No—it was impossible for me to see exactly where the break occurred.

Q. Yes, there was so much water. (88—77)

A. The volume of water; there was more or less timber and debris, and it was impossible to tell exactly where a leak came from any more than that you could see it when it came up to the surface.

Q. You could not tell very much where it came from?

A. You could tell approximately within a few feet of where it came from because you could see where it came loose.

Q. Could you tell that because you saw it come to the surface?    A. Yes.

Q. Was the water smooth, or running swiftly?

A. It was running very swiftly.

Q. Sometimes logs submerge, don't they, when a creek is running swiftly?

(Testimony of C. W. Stearns.)

A. I wouldn't say those logs would submerge so that you couldn't [62] see some portion of them—in fact, I would say that they did not.

Q. You just saw two logs?

A. I wouldn't say whether I saw two or more—I know I saw two.

Q. At that time? A. Yes.

Q. You couldn't see whether they came from the right bank of the flume or the left bank of the flume or some other place?

A. I am reasonably sure of it from the fact that I could see the outlet of the flume from the volume of water and the direction the volume of water was traveling. The flume above there wasn't broken to any extent, but it was impossible for you to follow the line of the flume.

Q. You say there was a good deal of debris and other articles coming down there. Just describe what that was, will you, Mr. Stearns—what it consisted of? A. Consisted of stumps.

Q. Any rocks?

A. Rocks, and I noticed considerable scrap lumber.

Q. Do you know where it came from? (89—78)

A. Why, I will have to presume that some of that smaller stuff came from the Basin.

Q. Where did the big stuff come from, do you think—the stumps and the logs?

A. Maybe from the basin.

Q. Were there any rocks coming down there?

A. No, I wasn't in a position to see any rocks at

(Testimony of C. W. Stearns.)  
that point.

Q. Couldn't hear any?

A. I could hear rocks working along, yes—you could hear the rocks and gravel working all the time.

Q. Did you see any portion of a bridge that came down at any time?     A. No.

Q. Didn't see any?     A. No.

Mr. FAULKNER.—That is all. [63]

Redirect Examination.

(By Mr. COBB.)

Q. Counsel asked you if you see where it broke. I will ask you if you tell from the deflection of the current towards the east side there, if you could locate about where the break was from that?

A. Approximately, yes.

Q. After it broke was there any change in the direction of the current?

A. Yes, there was; there was, whenever a log or any of that material formed a breakwater there it was a sort of wing dam, so that it threwed the water to the east side of the flume, of course.

Q. And that was the current that undercut and destroyed Mr. Eikland's house?

A. I presume it was, yes.

Mr. COBB.—That is all. (90—79)

Recross-examination.

(By Mr. FAULKNER.)

Q. Was all the water, Mr. Stearns, deflected to



(Testimony of C. W. Stearns.)

the easterly side of that flume, or did some of it go on the other side?

A. There was some of it went on the other side also.

Q. How much of it went on the other side compared to what went on the easterly side?

A. The greater volume of water was on the easterly side at that time.

Q. But there was considerable on the westerly side?

A. Yes, there was considerable water over there.

Q. How far up that creek did you go, going up towards the source, that morning?

A. I went to the Gold Creek bridge early in the morning.

Q. Did you see any logs or stumps up there coming down the creek?

A. I didn't see any logs at that time. I see debris of various [64] kinds there, some square timbers that possibly come from some of the flumes up in the basin.

Q. Did you observe at that time any portion of the bulkhead up from Gold Creek bridge, this same bulkhead that is marked on the map?

A. Yes, I looked at some of it—especially where the Power Company's pipe-line crosses the creek there.

Q. Was that all there at that time?

A. That at that time was intact.

Q. Any water going over it?      A. No.

Q. Any water behind it?      A. No.

(Testimony of C. W. Stearns.)

Q. That was behind the bulkhead there, outside of the creek?    A. At the Gold Creek bridge?

Q. Yes, just where it comes out of Gold Creek bridge, going towards the sea?

A. Behind the bulkhead there, there was nothing but the fill that (91—80) had been put in there originally.

Q. What kind of a fill was that?

A. Why, it is composed of debris that was excavated around the stumps, and material of that kind.

Q. As a matter of fact, it wasn't solid ground, was it?    A. No.

Q. It was filled in?    A. Yes.

Q. No trees or stumps or anything of that kind growing on it—no soil on it?

A. Well, I wouldn't say as to the soil.

Q. You didn't observe that?

A. I wasn't observing the soil on that particular occasion.

Q. As a matter of fact, it was all pretty well covered with water, wasn't it?

A. Yes, there was some water up on it, as I remember it. I was just simply looking at the conditions of the riprap and the possible damage that might be done to the Power Company's [65] pipe-line across there.

Q. You didn't observe very closely so you don't really know much whether it was a fill or whether it was natural ground over that point, do you, Mr. Stearns?

(Testimony of C. W. Stearns.)

A. I know from the fact that I had observed it before.

Q. And it was filled at that time was it?

A. I think so.

Mr. FAULKNER.—That is all.

Redirect Examination.

(By Mr. COBB.)

Q. Where is this ground you are talking about?

A. Why, underneath,—along there, following the creek, below the Power Company's pipe-line—just below where the Gold Creek bridge was.

Q. Which side of the creek—east or west side?  
(92—81)

A. I don't understand the question.

Q. I say on which side of Gold Creek, towards town or on the other side, away from town?

A. I observed both sides of the creek there.

Q. Who put that in, do you know?

A. No, I don't know anything about it.

Q. Was that the upper end of the same flume that passes Mr. Eikland's place and runs on out to tide water? A. I couldn't say.

Q. You don't know whether it is built continuous through there or not? A. No.

Q. You don't know whether that is a part of the improvements that the defendants attempted on Gold Creek in 1914 and '15? A. No, I do not.

Q. When is the first time you observed that?

A. I couldn't say.

Mr. COBB.—That is all.

(Witness excused.) (93—81½) [66]

Fifth. The testimony of LLOYD M. RITTER, as taken on former trial, as follows:

**Testimony of Lloyd M. Ritter, for Plaintiffs.**

**Direct Examination.**

(By Mr. COBB.)

Q. State your name, Mr. Ritter.

A. Lloyd M. Ritter.

Q. Where do you live?

A. I live on 9th Street.

Q. In the city of Juneau? A. Yes, sir.

Q. How long have you lived in Juneau?

A. Oh, possibly 15 years altogether.

Q. How long have you lived in this place, on 9th Street? A. About eight years.

Q. What has been your occupation since you have been in Juneau?

A. The last six or seven years I have been in the transfer business.

Q. Prior to that time?

A. Prior to that time I was in the bakery business.

Q. Now, Mr. Ritter, which way is your house on 9th Street, where you live, from Mr. Eikland's property which was destroyed?

A. It is in an easterly direction.

Q. About how far?

A. I should judge about a block—maybe a little more.

Q. Something like 200 feet?

A. 200 feet, maybe—300 feet at the outside.



(Testimony of Lloyd M. Ritter.)

Q. Were you in Juneau on the 26th day of last September?     A. Yes, sir.

Q. Do you remember the freshet in Gold Creek on that day?     A. Yes, sir.

Q. Where were you on that day?

A. Well, early in the morning I was at home. I left home in the (94—82) neighborhood of 5 o'clock and I didn't get back home until, oh, perhaps 7:30 in the evening. The rest of the day, all the time I was gone from home—I was on the Femmer and Ritter dock. [67]

Q. Did you notice the high waters there around his place that day?

A. Well, I noticed the destruction that was done during the day that night when I got home.

Q. Were you there during the day?

A. No, sir.

Q. Had you ever been on this property before this flood?     A. I have been all over those flats.

Q. Just describe to the jury this lot in reference to its elevation above the general level of the ground to the west from it.

A. Well, it was higher than the ground to the southwest.

Q. How much would you say about?

A. That would be pretty hard for me to say.

Q. Considerable slope over towards the southwest?

A. There is a considerable fall to the creek there; the water generally runs along at a pretty good pace—that is the only thing I have to go by is the

(Testimony of Lloyd M. Ritter.)

swiftness of the water.

Q. Did you ever notice the surface of his ground?

A. Yes.

Q. Any indication of growth on it?

A. Yes, there was.

Q. What was it?

A. Well, there were a number of stumps on it at one time—I don't know how many, but several of them, I should say.

Q. Just describe or give the jury the best idea you can about it, as to any of those stumps—the size of them, and what size trees would produce them.

A. Well, I hauled the lumber for Mr. Eikland's house, or a good part of it anyway, and there was enough stumps on that ground (95—83) so it made it hard work to get and around by a team; and there were some of them, I suppose, that were,—oh, they would run from 2 to 4 feet in diameter.

Q. Was the ground all marshy, boggy, or was it solid?

A. No, it was good solid ground—solid enough to carry a [68] team of horses and a wagon.

Q. Now, on this morning of the 26th, you were there, did you notice the freshet in Gold Creek alongside of Mr. Eikland's property that morning before you left?

A. No, I didn't; it was too early in the morning for me to pay any attention to anything of the kind. I knew the water was up, but as to noticing it, I didn't.

(Testimony of Lloyd M. Ritter.)

Q. Did you see the flume afterwards—later, after the waters went down?

A. I see it that night when I went home, what there was to be seen from my residence.

Q. What did you see then?

A. Well, Mr. Eikland's house was gone, and a couple of—I don't know just how many—some two or three more houses were gone. One man's house, it seemed to be sitting right in the middle of what formerly had been 9th Street—sitting out in the creek—it had been washed out there.

Q. Just step down here to this plat, Mr. Ritter, a moment. Mr. Eikland's property on this plat is right here, lot 6, block 209. Your house is about at that point on 9th Street, isn't it?

A. Yes, I think that would be my lot right there. It is a triangular shaped piece—that is the piece of ground right in there—just a triangular piece of ground—it is possibly 25 feet wider at one end than it is at the other.

Q. Now, how far towards this cribbed flume before these flood waters came did the high ground extend? A. I don't understand the question.

Q. You testified, as I understand, that this was high ground in here—solid ground, covered with stumps? (96—84) A. Yes, sir.

Q. Mr. Eikland's property—how far towards the southeast did the high ground extend on that bank?

A. Well, there was two houses between his house and the creek. [69]

(Testimony of Lloyd M. Ritter.)

Q. Were they on ground about as high as Mr. Eikland's?

A. Yes, I think—it might have been some lower, but not a great deal, because it couldn't fall very much in that distance.

Q. How about the level of this ground as to the height compared with the level of the top of the flume? A. I don't recall that.

Q. When you got there that evening—have you at any time since then observed anything that is damming up this cribbed channel?

A. I haven't been down there since the flood—I have had no occasion to go.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. What time *was* you left the house that morning, Mr. Ritter?

A. Well, I should say it was in the neighborhood of 5 or 5:30.

Q. Before daylight?

A. I cannot recall that part of it. It would have been getting around pretty close to daylight at that time.

Q. When did you return, did you say?

A. It must have been 7:30 in the evening.

Mr. FAULKNER.—That is all.

(Witness excused.) (97—85)



Sixth. The testimony of HANS BERG, also taken on the former trial as follows:

**Testimony of Hans Berg, for Plaintiffs.**

Direct Examination.

(By Mr. COBB.)

Q. State your name?      A. Hans Berg.

Q. Where do you live?

A. I live on 11th and B Streets.

Q. In the Casey-Shattuck addition?

A. Yes, sir.

Q. How long have you lived there? [70]

A. I have lived there since the 16th of September.

Q. 16th of September, 1918.      A. Yes, 1918.

Q. How long have you lived at Juneau?

A. Well, I have lived in Juneau, with the exception of 4 months, since about the 10th of May, 1913.

Q. You were away three or four months?

A. Yes—that was in December, 1914, to the first of April.

Q. Were you out in the vicinity of your home on the 26th day of September, 1918, the day of the freshet?      A. Yes.

Q. Did you observe the high water on that day?

A. Well, quite closely after I got home, yes.

Q. What time did you get home?

A. Well, it was around about half-past twelve or a quarter to one.

Q. Where were you before that?

A. I was down here working on a building next to the Graves Clothing store.

(Testimony of Hans Berg.)

Q. Now, just point out to the jury here on this map, Plaintiff's Exhibit "A," where your home is. You say you live on the corner of 11th and B Streets? A. Yes. (98—86)

Q. That would be at this point here?

A. On this lot here.

Q. Did you have a clear view from there down to where Eikland's house was?

A. Quite clear, yes.

Q. On down the street?

A. On down the street.

Q. Did you see Eikland's house go?

A. Yes, sir.

Q. Where were you at the time?

A. Right in the street here.

Q. Watching? A. Watching.

Q. How long had you been there before the house went?

A. Well, to say to a minute, I couldn't say but about three-quarters of an hour after I came home.

Q. You had been watching for three-quarters of an hour what was being done there? A. Yes.

Q. There had some other houses gone out before that? A. Yes. [71]

Q. Now, I want you to describe to the jury when you first noticed, or went out there to take a look at things, could you tell whether any part of the flume had gone—the flume that carried the creek before that?

A. It looked like when I came home there was

(Testimony of Hans Berg.)

a part of it out—had gone out between A and B Streets over there.

Q. Somewheres in there?

A. Yes, somewheres in there.

Q. What was it indicated to you that it had gone?

A. Well, indicated to me that the water was thrown over more on the east bank there.

Q. There was big current going in that direction? A. Yes. (99—87)

Q. Could not have gone there if the embankment had held, you think?

A. Not very well, in my opinion, you know.

Q. Was there anything to indicate to you, or did you see anything that indicated to you that this artificial channel had been blocked up in any way?

A. Well, it looks like there was something in there, but the water was at that time so high that I couldn't see exactly what it was, but there was something in the channel, that kind of threw the water over to the south bank of that creek.

Q. South or southeast bank. Now, that water that was being thrown over there, what was it doing in reference to the ground of Eikland's lot?

A. Well, so close as I could see from the point I was watching it, it was cutting in—sort of undermining the ground.

Q. Was any part of the lot that wasn't cut out by the water flooded—was the water high enough to cover the lot in its original condition?

A. Well, I don't believe it could, although it was

(Testimony of Hans Berg.)

hard to see from there. [72]

Q. It was hard to see from where you were?

A. Yes sir.

Q. You knew Mr. Eikland's lot—you had seen it lots of times before?

A. Yes, I knew Eikland's lot.

Q. It was a good high lot?

A. Fairly high, yes.

Q. Have you seen that ground down there since the water went down?

A. You mean where Eikland's lot was?

Q. Yes, and the creek-bed along there?

A. Yes.

Q. How long after the flood were you down there?

A. The next day I went to work again, so I didn't pay close attention to it.

Q. Have you seen it since *the*? (100—88)

A. Oh, yes.

Q. Did you see anything in there at the place where this swirl of the waters towards the east bank came that would have caused it?

A. There was some logs and some rubbish in there—roots.

Q. About at the place where this—

A. Well, about there, yes—you couldn't see exactly, because the water was high—you couldn't see exactly where it was.

Q. Have you seen the lower part of the flume since then?

A. Just from walking by Willoughby Avenue, yes.



(Testimony of Hans Berg.)

Q. It is full of rubbish and stuff, *it it*?

A. Yes.

Q. Now you had often seen that artificial channel of Gold Creek, or the flume before this flood, had you not?     A. Yes.

Q. Now on these occasions did you ever notice where it crosses the main original channel of Gold Creek,—you know where it crosses the channel?

A. Yes.

Q. Did the embankment on the west side of the creek hold at place, or was it broken out, too?

A. No.

Q. That held, did it?

A. That I understand is there—that was right by 10th Street, where the bulkhead crosses the old channel. [73]

Q. Yes, that held. If that bulkhead had not been there, or if it had given way do you know which way the waters would have gone then, in their natural flow?

A. Well, as far as I could see they would go down the old channel—the old channel that was there when I first came to Juneau; I believe they couldn't have gone any other way, because that was the lowest place.

Mr. COBB.—That is all.

Mr. FAULKNER.—No cross-examination.

(Witness excused.) (101—89)

Seventh. The testimony of PETER COGGINS, also taken on the former trial, as follows:

**Testimony of Peter Coggins, for Plaintiffs.**

Direct Examination.

(By Mr. COBB.)

Q. State your name.      A. Peter Coggins.

Q. Where do you live, Mr. Coggins?

A. On A Street, the foot of Distin Avenue,

Q. In Juneau, Alaska?      A. In Juneau, Alaska.

Q. How long have you lived in Juneau, Alaska?

A. Well, I came to Juneau, Alaska, 1896, and I lived here more or less ever since.

Q. This has been your headquarters then, ever since?      A. Yes, sir.

Q. What is your occupation?

A. Engineer—stationary engineer.

Q. During the 23 years you have been up here have you noticed weather conditions?

A. I have very often observed the weather conditions.

Q. This is a very rainy coast, isn't it?

A. Yes, it is a rainy coast.

Q. Now, I will ask you whether or not this region of the country around Juneau and South-eastern Alaska is subject to [74] heavy rainfalls at times, and high waters in the streams? (135—121)      A. Yes, it is.

Q. Do you remember the high water and freshet that occurred at this place on the 26th of last September?      A. I do.

(Testimony of Peter Coggins.)

Q. Where were you on that day?

A. I was at the Alaska Light and Power Company's power-house.

Q. Did you observe the flood during the day?

A. I did.

Q. Now, I will ask you, Mr. Coggins, if you have, in your life in Juneau, Alaska, seen other freshets as high, or practically as high as that one?

A. Well, I couldn't say whether I did or not. I didn't ever pay any attention to freshets. I have seen a great many freshets here but never paid any particular attention as to whether they were as high as that or not—I have seen very heavy rains here.

Q. And very high water in the creeks?

A. Yes.

Q. You wouldn't undertake to draw a comparison, then?     A. No, I would not.

Q. Can you give the jury your best estimate on it?

A. Well, I think we have had freshets here that was very near as high as that one. I have seen high water, as I say; never paying particular attention to the height of the water, and at those times—those freshets I couldn't say that they were as high as this, and they might have been higher for all that I know.

Q. About how often do these freshets come as a rule?

A. Well, about every five years, is my observation.

Q. That is, you have never noticed a longer period

(Testimony of Peter Coggins.)

than five years between these very high freshets, you think?

A. No; practically speaking, about 5 years.

Q. Is there or is there not considerable variation in the amount of rainfall from year to year? (136—122) A. Oh, yes. [75]

Q. That is, as to the amount of rainfall at any one time?

A. There is quite a difference in the rainfall from one year to the other. Some years we don't have near as much rain as the others—some years we have very heavy rains for a short period.

Q. Mr. Coggins, on September 26, 1918, what time did you get down to your place of work at the Electric Light Company's plant?

A. About 8 o'clock in the morning.

Q. You live right near there?

A. I live right there; yes, sir.

Q. What time did you first observe the waters that morning? A. Shortly after 8 o'clock.

Q. What was their condition at that time?

A. Well, the creek was running about full of water at that time when I first noticed it, and spattering over in places—over the bulkhead.

Q. Any indication of danger at that time?

A. Well, yes, I could see there was stumps and timber and such things coming down the creek and catching, because the water was flowing over.

Q. Whereabouts was it catching?

A. Well, catching in the creek; there was timbers across the top.



(Testimony of Peter Coggins.)

Q. Whereabouts along this flume?

A. That was right opposite the power-house—the Alaska Light and Power Company's power-house.

Q. Near the lower end of the flume, a short distance from where it discharges into salt water?

A. Near the lower end, yes.

Q. I will ask you to step down here a minute, Mr. Coggins. Can you point out on this plat—this is a plat of part of the Casey-Shattuck addition. This is 8th Street, and this represents the flume, where it was. This piece of ground, large, [76] irregular shaped piece of ground near the southeasterly corner of the (137—123) plat is the Light Company's property. How far from that flume, about, is it to the Light Company's plant?

A. About, I should judge, not over 300 feet.

Q. You don't know just how far it is?

A. I don't know just how far it is—I never measured it.

Q. The Light Company's plant is very close to the tide line, is it not? A. Yes.

Q. You say it was about opposite that point where the jam came and it was catching?

A. That is where the water first came over.

Q. Did you notice the first blocking—the first formation of a jam in the flume? A. I did.

Q. At what time of day was that?

A. About 8:30.

Q. You say that was somewhere about opposite the Light Company's plant? A. Yes, sir.

Q. How did that jam form?

(Testimony of Peter Coggins.)

A. Well, there was such a large volume of water coming down there that I couldn't see what caught, whether it was stumps or timber—I know there was both stumps and timber coming down the creek.

Q. And it caught and jammed in there—that was plainly evident, was it?     A. Yes.

Q. After the first jam formed, I want you to describe to the jury what occurred in the flume after that.

A. When the jam formed over here I believe about all the water in the creek was thrown over towards the power-house, and when I first saw the jam forming there, I saw, or thought I saw, danger for the Light Company, and I phoned to the office to the manager and he came down and looked around and by (138—124) that time the first jam had broke away—kind of [77] cleared itself, so the manager went away, and a short time after he went away another jam formed.

Q. About the same place?

A. About the same place, and then it threw all the water over towards the power-house, and I phoned to him again—that was about 9 o'clock in the morning—the water was all coming through there, and the manager came down there the second time and took steps to protect the Light Company's property there; what he done I don't know because I was very busy myself and I don't know just what he done.

Q. When the second jam formed, did that go out at all?     A. No, that didn't go out.

(Testimony of Peter Coggins.)

Q. Do you know how far up the flume the debris and timbers and stumps, sand and rocks collected after this formation of the second jam?

A. No, I don't—I don't know how far up. When I saw that jam didn't go out—that jam moved, then caught, and moved a little farther out, and caught several times, but never cleared, the second jam.

Q. Did it keep filling up, or not, farther up the flume? A. Yes.

Q. That entire flume. Have you noticed it since the flood?

A. I didn't go up along there—I haven't went any farther up than the power-house.

Q. You could tell it was filling up a considerable ways farther up, that day, after this jam formed?

A. Yes, sir.

Q. Do you know where Mr. Eikland's property is? A. Yes, sir.

Q. Did you go up there that day? A. Yes, sir.

Q. What time of day was it?

A. Some time after dinner—in the afternoon—I don't know what (139—125) time—might be 2 o'clock.

Q. At the time you got there had Mr. Eikland's property been [78] destroyed?

A. Yes, Eikland's house was gone when I went up there.

Q. And which way was the main current of the stream then with reference to where the flume had been? A. It was coming this way.

Q. Towards the east or northeast side of the

(Testimony of Peter Coggins.)

flume?     A. Yes.

Q. Could you tell what was making it do that?

A. No, I couldn't say what made it do that. I didn't have time to make any observations there or look around—I was very busy. We was afraid the water was going to come through at any time at the power-house, and I went up there at this particular time to see if there couldn't be something done to stop it.

Q. A great deal of water—the bulk of the water was coming over the east side of where the flume had been?     A. Yes, sir.

Q. Across to where Mr. Eikland's house and lot had been?     A. Yes, sir.

Q. Was there any great amount of it going down the old channel—do you know where that is?

A. Yes; there wasn't very much going down the old channel. There was kind of a ridge formed in the creek—that is, speaking of the creek where it run that morning, and it spread the water different ways.

Mr. COBB.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Coggins, when you first went out there did you notice any water flowing any other place except in the flume?     A. No, sir. (140—126)

Q. Nowhere else?     A. No, sir. [79]

Q. And the flume was full at that time, was it?

A. Yes, sir.



(Testimony of Peter Coggins.)

Q. And was the water spilling over?

A. The water did not begin to spill over until this timber commenced to come down.

Q. Where was it you saw that timber lodge?

A. About opposite the power-house—probably a little farther down towards the bridge—between the bridge and the power-house.

Q. Which bridge is that, Mr. Coggins?

A. The bridge on Willoughby Avenue.

Q. Between the bridge and the power-house?

A. Yes, sir.

Q. How close to the bridge?

A. Well, it might be 200 feet from the bridge.

Q. Did you observe whether there was anything at the bridge—did you observe the condition of the water at the bridge?

A. Not at that time, no.

Q. Don't know just how high it was?

A. No, sir.

Q. Did you observe it later on?

A. Well, no; the first time that I saw the Willoughby Avenue bridge, why, there was a block—the whole creek was blocked up with timber, stumps, and such as that, so there was no water running under the bridge at all.

Q. Where was the water going at this time?

A. At this time I am speaking of it was going over towards the Native Hospital.

Q. In which direction was that—easterly or westerly—from the flume?

A. That would be westerly.

(Testimony of Peter Coggins.)

Q. The flume for a certain distance crosses the property of the Electric Light Company, don't it? (141—127)

A. I don't know where the line of the Electric Light Company's property is so I don't know whether it crosses it or not?

Q. And you don't know whether this flood was as high, or higher [80] or lower, than other periods of high water, in the last 25 years?

A. No, sir, I don't.

Mr. FAULKNER. That is all.

(Witness excused.) (141½—172½) [81]

### **Testimony of John Wagner for Plaintiffs.**

JOHN WAGNER, called as a witness on behalf of the plaintiffs, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. COBB.)

Q. Please state your name? A. John Wagner.

Q. Where do you live, Mr. Wagner?

A. Live at Salmon Creek.

Q. Which way is Salmon Creek from Juneau—how far?

A. About three; three and three-quarters of a mile.

Q. Speak a little louder.

A. Three and three-quarters of a mile.

Q. Up the Channel? A. Up the Channel.

(Testimony of John Wagner.)

Q. West or northwesterly? A. Northwesterly.

Q. The other side of Gold Creek from Juneau?

A. Yes.

Q. Mr. Wagner, how long have you lived in this portion of Alaska? A. Ever since 1886.

Q. Ever since 1886. Or did you say '96 or '86?

A. '96, I mean to say.

Q. 1896. Now, have you had occasion to observe the weather during that time?

A. I have

Q. What is your occupation? A. Mining.

Q. How long have you engaged in mining?

A. How long? I have been engaged in mining ever since I have been in Aaska, but I was engaged in mining ever since I [82] was eleven years old.

Q. From 1896 on, you have been mining around here, in Alaska?

A. Yes, around Salmon Creek, Gold Creek, Berners Bay—

Q. Now, do you recall the flood of 1918, September 26— A. (Interrupting.) Yes.

Q. (Continuing.) that carried away Mr. Eikland's property? A. Yes, sir.

Q. Where were you that day?

A. I was out—I was out at Salmon Creek that day.

Q. You were out at Salmon Creek?

A. I was out there that day and come in from there to town.

Q. Came in to town? A. Yes.

(Testimony of John Wagner.)

Q. Now, you had good occasion, then, to observe the height of water and the amount of rainfall—

A. Yes, sir.

Q. (Continuing.) So far as the rainfall affected the flood waters? A. Yes.

Q. I will ask you, Mr. Wagner, if during the twenty-odd, twenty-five years or more that you have been up here, had been up here at that time, you had ever observed a rainfall as heavy and water as high in the creeks? A. I have.

Q. As high as it was on that day?

A. Yes; there was two feet and a half higher water the year we built the house—

Q. (Interrupting.) How's that?

A. It was two feet and a half higher when we built the house, the big house out there at Salmon Creek. [83]

Q. Now, when do those rainfalls usually come?

A. In the fall; in September.

Q. Do you remember the flume or cribbed channel, or artificial channel that was put in by Casey and Shattuck? A. Yes, sir.

Q. From the mouth of Gold Creek up the creek?

A. I do.

Q. You observed that while it was being built, or about the time? A. Yes. What is that?

Q. Did you observe it then? A. Yes.

Q. When it was being built? A. I did.

Q. I will ask you if, as a practical miner, you have had any experience in building cribbed channels where you have no other material except logs



(Testimony of John Wagner.)

and so on, bulkheads and so on, to confine the waters of streams?     A. I have.

Q. You know how they should be built?

A. Yes.

Q. I will ask you how this channel, this cribbed channel that was put in down there on the flat past Mr. Eikland's property and down to the sea, how that was built; if anything was wrong with it, explain to the jury what was wrong, what made it dangerous.

A. It never was put down to the bottom of the channel; that is, to the bottom of the creek-bed.

Q. How's that?

A. It hadn't been put below the creek-bed. It was put on from [84] boulder to boulder and the boulders, of course, washed out and away it went. When one went, it all went.

Q. Just repeat that a little louder?

A. I said it wasn't put down far enough, not even to the bottom of the creek-bed. It was put down from boulder to boulder, and then when the boulders washed out, why away it went.

Q. That is the foundation logs were not put down sufficiently deep?

A. No; they ought to have been put down below the creek-bed, by rights.

Q. Yes. Now, did you observe what happened to that—     A. (Interrupting.) Yes, I did.

Q. (Continuing.) When that flood came in?

A. I did.

Q. What did happen?     A. It all went out.

(Testimony of John Wagner.)

Q. Now, I want you to describe to the jury, in your own way, how that, the sides of that artificial channel put in by the defendants, Casey and Shattuck, how it was built?

A. Well, it was timbers; timbers were run from one boulder to the other, and, of course, when those logs and boulders were undermined, they rolled over and the logs went and then the whole thing went out.

Q. How long were the timbers, about?

A. I guess some of them were close to twenty-five, thirty feet long.

Q. You didn't notice the length?

A. No; I didn't measure them.

Q. Pretty long timbers?

A. Yes; pretty long timbers. [85]

Q. Now, in what manner were they put down, generally below or above the level of the creek-bed?

A. Generally above.

Q. Now, tell the jury. Just describe it to the jury so they will understand—some of them may not be familiar with that kind of work—just what is likely to happen to it during a period of high water? A. Well, it would go out.

Q. Now, whenever there is flood waters in streams of this country, high water, as it is called, I will ask you if it isn't the general rule that debris, stumps and logs of every kind— A. Yes.

Q. (Continuing.) Brush, and so forth, are brought down with the high waters?

A. Brush, logs and everything else comes down.

Q. Watersheds here are very steep? A. Yes.

(Testimony of John Wagner.)

Q. Now, I will ask you, Mr. Wagner, if in building a channel, an artificial channel or flumeway to carry the waters of a stream, where you have no penstock to take out the stuff that the stream brings down, is it the proper and workmanlike way to build it to narrow the width of that channel at its lower end or place of discharge into the sea? A. No.

Mr. FAULKNER.—Just a minute. I object to that. The witness is not qualified at all; the witness hasn't been qualified.

Mr. COBB.—I think he has. He says he has had a great deal of experience in building flumes, and so forth, and knows how these things ought to be constructed to handle water. [86] Most any miner is qualified.

The COURT.—I think he may answer.

Q. Yes. You have had a great deal of experience in that kind of work?

A. I have; I have put in abutments for bridges, and iron bridges too.

Q. Now, you can answer the other question? (Following question repeated by reporter:) "Now, I will ask you, Mr. Wagner, if in building a channel, an artificial channel or flumeway to carry the waters of a stream, where you have no penstock to take out the stuff that the stream brings down, is it the proper and workmanlike way to build it, to narrow the width of that channel at its lower end or place of discharge into the sea? A. It ain't.

Q. Just explain why it is ont, and what is likely to happen if it is narrowed like a bottle neck at

(Testimony of John Wagner.)

the lower end?

A. There is where it would block up until the water would go somewhere else.

Q. Block up with what?     A. Yes.

Q. Block up with what?

A. With rubbish that comes down the creek.

Q. Do you know whether on not the flume that was put in by the defendants did block up at the time of the flood we're inquiring about?     A. Yes.

Q. Did you observe it?     A. Yes.

Q. Just tell us what you saw? [87]

A. Well, it filled up with logs of all kinds, timbers and stumps—anything that came down the creek.

Q. Were you in Juneau on the 26th day of September, 1918, the day of that big flood?

A. Why yes; I was out there and I came in.

Q. What time of the day, about, did you come in?

A. I think along about two o'clock; about two o'clock.

Q. Which way did you come after you got here, into town, on the flat?

A. I came up through the graveyard and came over this bridge up here just before it went out. They hollered not to cross, but I made it all right.

Q. The Gold Creek bridge?

A. The Gold Creek bridge; that is, the upper one. They hollered not to cross.

Q. You think that was about two o'clock?

A. Yes; about that. I don't know exactly what time it was.

Q. Now, just tell the jury what you saw on that



(Testimony of John Wagner.)

day in regard to high water on the flats at the time you came in?

A. Well, they were carrying people out of the houses, away from their houses and carrying furniture away; that's all I noticed; I didn't go down there.

Q. You had often observed high water on those flats before?

A. Yes, sir; but not as bad as that

Q. And you have seen it as high as it was that day?     A. Sure.

Q. Now, prior to 1913, or 1914, '15 and '16, along there, there were no new buildings, to speak of, out on the flats?     A. No.

Mr. FAULKNER.—Just a minute. I object to that as leading. [88]

Mr. COBB.—I think that it is leading. I withdraw it.

Q. Do you know when the flats were first built up, houses put up?     A. Why—

Q. You don't recall?     A. I don't recall.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Wagner, how long have you been engaged in mining?

A. Ever since I was eleven years old.

Q. And—

A. (Interrupting.) I didn't have to come to Alaska to learn that.

Q. And how long is it since you have quit mining?

A. How?

(Testimony of John Wagner.)

Q. How long is it since you have quit mining?

A. I ain't quit.

Q. Still mining.      A. Yes.

Q. Where did you have experience in the building of bulkheads, to carry the banks of streams?

A. I had that back East and I have had it right here.

Q. Whereabouts in the East?      A. In Illinois.

Q. Where?      A. In Illinois.

Q. For what purpose?      A. Galena M.

Q. What is that?      A. Galena M. [89]

Q. For what purpose did you build bulkheads there?      A. For bridges; iron bridges.

Q. You built iron bridges?

A. I built abutments, put abutments in for a bridge over the Freeport River.

Q. Over what?      A. Freeport River.

Q. Put abutments in there?      A. Yes.

Q. Now, where did you build bulkheads?

A. In Salmon Creek.

Q. Whereabouts is the bulkhead there?

A. Right at the falls; built there since 1900.

Q. A bulkhead?      A. Yes.

Q. When was that?      A. Put up in 1900.

Q. How big was it?

A. It was about forty feet long. We had to cut some of it off in order to put that building up there, but the rest of it is there.

Q. Is that a bulkhead or flume?

A. No; it's a flume.

Q. Now, Mr. Wagner, are you familiar with the

(Testimony of John Wagner.)

action of streams in times of high water? A. Yes.

Q. In those flumes and places? A. Yes.

Q. Know about the capacity of streams, how it varies with the amount of water, do you? [90]

A. Yes.

Q. Now, what is the difference between— You know that streams, as they flow down the mountains, have a certain carrying capacity? They carry down stumps, you say, and debris? A. Yes.

Q. Timber and such things at times?

A. Yes.

Q. Now, supposing you have a stream flowing down, like Gold Creek, with a certain volume of water in it, if you increase that volume—double it, say—what would be the difference in the carrying capacity? How much more stumps and debris would it have the capacity to carry?

A. It wouldn't carry any down in the winter-time when there isn't any water, but it would carry it when there is a flood.

Q. I don't think you answered the question. Say you have a thousand cubic feet per second coming down there— A. Yes.

Q. And that that is increased to two thousand feet per second. A. Yes.

Q. What is the difference in the amount of material that will be carried down?

A. Oh, it will carry down quite a bit more, if there is any in the way.

Q. Twice as much? A. Yes.

Q. Well, how much more?

(Testimony of John Wagner.)

A. Well, it is hard to tell. Anything that is in the creek it will carry down, if it is loose.

Q. I know, but there is a limit to its capacity.  
[91]

A. Yes, sure.

Q. Well, now, would it carry down—when the volume or the velocity of the stream is twice as great, will it carry down twice as much?

Mr. COBB.—I shall object to that as not proper cross-examination. We didn't ask him about that. This is a practical man and he is asking him a question that the most careful mathematicians might differ about, because it is not exact.

The COURT.—Objection overruled. He is put on here as an expert.

Q. I just want to get your best idea, Mr. Wagner.

A. Sure, when there is more water, it will carry more down.

Q. Well, how much more will it carry if the volume of water is doubled?

A. It is hard to tell. It just depends upon whether there is anything in the road. If there isn't anything in the road, it would carry nothing.

Q. Supposing there is a stream like Gold Creek that we're talking about, and there is a thousand cubic feet per second flowing down there, and you fill it up with logs and debris of all kinds, all that it will carry—

A. Yes.

Q. And then comes along a flood and increases it to two thousand cubic feet of water per second and it is filled up with debris, all that it will carry, how much



(Testimony of John Wagner.)

more will that be? How much more will that carry when the volume of water is doubled?

A. I don't know how much more it will carry down. If there isn't anything in the road, it won't carry nothing down.

Q. No; I mean if there is anything in the road?  
[92] A.

Q. Have you any idea how much more?

A. No, I don't.

Q. You haven't any idea? A. No.

Q. Now, Mr. Wagner, in building a bulkhead or flume, to confine the banks of a stream, or to carry the stream, is there any standard of measurement as to the size of that? What do you go by?

A. What would you go by?

Q. Yes; as to the width and capacity of it. What would you measure it by? What would you take into consideration in the building of a bulkhead or flume? A. What would I go by?

Q. Yes.

A. I would try to put it in below the creek-bed so it wouldn't go out.

Q. Now, that isn't the question.

The COURT.—How would you determine the capacity of a bulkhead or artificial channel?

Q. How would you determine the capacity of it? Now, if you were building a flume to carry a stream of water, or if you were building a bulkhead to carry a stream, how would you determine the capacity of it? What would you take into consideration?

(Testimony of John Wagner.)

A. Well, I wouldn't know what, how much water. I would try and build it strong enough so it would stay there.

Q. I know, but what would you take into consideration to get the capacity, to get the size of it?

A. To get the size of it?      Q. Yes? [93]

A. Well, I wouldn't try to narrow it down at the lower end.

Q. Well, now, you say this shouldn't be narrowed up at the lower end. Tell us where it should be narrowed.      A. If anything I would widen it.

Q. Where would you widen it?

A. Then it would leave the rubbish go down there, go down through it.

Q. How would you determine that? What do you take into consideration when you determine the capacity of a bulkhead or flume?

A. Well, I wouldn't— You would have to leave it wider at the lower end so as to leave the rubbish go through.

Q. Is there any limit to the width you would have at the lower end? Suppose you had it a mile wide, would that make any difference?

A. No, but I wouldn't try to narrow it up.

Q. Well, now, supposing you had a bulkhead or flume to carry Gold Creek, and you widened it out materially at the end, what would be likely to happen? What would be likely to happen with the debris and timber and stumps coming down?

A. They would go down through.

Q. They would?

(Testimony of John Wagner.)

A. Yes; they would be more apt to go on through. It's like putting a demijohn in the lower end of the creek and trying to catch all the water through a demijohn.

Q. Would it cause the debris to lodge— If you widened it out at the outlet, wouldn't it have a tendency to cause the stumps and rubbish to gather at the outlet? A. Huh?

Q. Wouldn't widening it out at the outlet cause the stumps and [94] rubbish to gather at the outlet?

A. They would go out; they wouldn't block it.

Q. You wouldn't pay any attention to the debris or the course of the stream?

A. No; it would go out the way it always had. If it wasn't narrowed up, it would go out; water always does. I wouldn't try to run it up hill, though.

Q. Would that make any difference as to the width of the outlet and the debris; that is, the swiftness of the current?

A. Well, it would make a difference. If it had a steep grade it would be better.

Q. Better for what?

A. Better to carry the rubbish out.

Q. Better to have it wide or narrow?

A. No; wide.

Q. So, in building a flume or bulkhead, you would always have an intake narrower than the outlet? That is proper, is it? A. Yes.

(Testimony of John Wagner.)

Redirect Examination.

(By Mr. COBB.)

Q. The difference between the hypothetical, supposed case, where they widen them out and where they narrow them is simply the difference between choking them up and leaving them free for the water to carry out whatever it has power to do?

A. Sure; gives it its own course.

Q. If it chokes up because of a narrowing of it, the debris and so on becomes wedged so it can't be moved? A. Yes.

Q. Is that it? [95]

A. Yes, sir; that's what happened down there.

Mr. COBB.—That's all.

Recross-examination.

(By Mr. FAULKNER.)

Q. What comes down Gold Creek, or this flume you're talking about? A. Rubbish of all kinds.

Q. What kind? Describe to the jury what comes down there?

A. Well, stumps, timbers, bridges and anything that comes loose up there.

Q. Well, I mean they are not coming down every day, bridges and so on.

A. Oh, no; when there is a flood, I mean.

Q. Doesn't sand come down, and gravel?

A. Sure.

Q. And if you have a wider outlet, that sand and gravel is less likely to lodge than if you have a nar-



(Testimony of John Wagner.)

rower outlet, is it? The sand and gravel would be kept clearer with a wider outlet?

A. No; the sand generally fills up at the mouth, sometimes.

Q. Yes.

A. But, then, if you keep it narrow, sand will clear through better.

Q. The sand will clear through better. That's all.

Mr. COBB.—Plaintiff rests.

And thereupon the defendants, to maintain the issues on their part, introduced the following evidence, to wit:

**Testimony of Allen Shattuck, for Defendants.**

ALLEN SHATTUCK, one of the defendants herein, called as a witness on their behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Shattuck, please state your name? [96]

A. Allen Shattuck.

Q. You are one of the defendants in this case?

A. Yes.

Q. And you are familiar with the property mentioned in the complaint, are you?     A. Yes.

Q. Mr. Shattuck, I will ask you if you own that tract of land described in the complaint?

A. I own a quarter interest.

(Testimony of Allen Shattuck.)

Q. A quarter interest. And who owns the balance?

A. Mr. Casey owns a half interest and my brother Henry owns a quarter interest.

Q. When did you acquire that? A. In 1903.

Q. 1903? A. 1903.

Q. Where did you get that?

A. Bought it from a man by the name of Calhoun.

Q. What happened, if anything, after you bought it?

A. It was located as placer claim on account of the fact that the—

Mr. COBB.—(Interrupting.) I think all that is immaterial. It's admitted. I simply want to save the record. The trouble they had in getting title to it is wholly immaterial.

The COURT.—Yes.

Q. How large was that tract?

A. It contained approximately thirty-five acres.

Q. Thirty-five acres. Now, you say you acquired it in 1903? A. Yes. [97]

Q. What was done with it between 1903 and 1913, if anything?

A. Nothing, except that it was used as a cow pasture.

Q. Now, where do you live? A. I live—

Q. (Interrupting.) With reference to the tract of land? A. I live on the tract of land.

Q. You live on it? A. Yes.

Q. At what point?

A. On the southeastern part of it.

(Testimony of Allen Shattuck.)

Q. How long have you lived there or in that vicinity?     A. Since 1905 or 6.

Q. You live in sight of Gold Creek?     A. Yes.

Q. Now, in 1912, what, if anything, did you do with the land?

A. We had it platted along about 1912.

Q. You had it platted?     A. Yes.

Q. Who made the survey?

A. Fred Wettrick and Lloyd G. Hill.

Q. What was the purpose of having it platted?

A. To offer it for sale as town lots.

Q. When was that done?

A. It was done, I believe, in 1912, or early in 1913; some time in that vicinity.

Q. In 1912 and prior to that time were you familiar with the course of Gold Creek as it flowed out over that land?     A. Yes.

Q. Where did it go at that time? Point out to the jury on the plat Plaintiff's Exhibit "A," where Gold Creek went in its [98] course as it came down through the canyon?     A. At what time?

Q. Prior to 1912; prior to 1912 or 13.

A. The greater part of the creek ran down what is marked on this chart as "the original channel," prior to 1912.

Q. Now, you say the greater part of it?

A. Yes, sir.

Q. Where did the other part of it go?

A. Sometimes it flowed—prior to 1912, there was a small stream flowing down what is marked as the "old channel," and a part of it flowed down near

(Testimony of Allen Shattuck.)

what is marked as the "new channel" on this plat.

Q. Now, was there any water flowing in what is marked as the "cribbed channel"?

A. In some parts of it.

Q. Now, in 1913— You say that was prior to 1913? A. Yes.

Q. Now, in 1913, what, if anything, happened to the creek bed?

A. High water that occurred in the fall of 1913 filled up the original channel?

Q. Filled up what is marked as the "original channel"? A. Yes.

Q. Where did the creek go then?

A. The creek spread out through different channels after that channel was filled up. Some of it flowed down what is marked on this chart as the "cribbed channel," and some of it flowing down in the vicinity of what is marked as the new channel.

Q. Where was the largest part of it going after 1913?

A. The larger part of it was going down in the vicinity of what [99] is marked as the "cribbed channel" and what is marked as the "new channel."

Q. Was there a channel on what is marked on the map as the "cribbed channel"? A. Yes.

Q. 1913? A. Yes, sir.

Q. And had there been water going over there before that? A. Yes.

Q. Now, in 1913, what did you do? You say there was a period of high water in 1913. What time was that?



(Testimony of Allen Shattuck.)

A. In the fall; I don't recall what time in the fall.

Q. That was a considerable flood, was it not?

A. Yes, it was.

Q. Now, in 1913, what did you do with the creek, if anything?

A. We didn't do anything with the creek in 1913.

Q. Well, in 1914?

A. We built a cribbing on each side of the channel.

Q. Now, was that built on the main part of the channel, what was then the main channel?

A. What we considered the main channel.

Q. At that time?      A. Yes.

Q. Where was that cribbing built?

A. I don't understand.

Q. I say, where was it built, on the banks?

A. Built on the banks of the stream, as it flowed down through the tract.

Q. Now, will you describe to the jury how that cribbing was built? [100]

A. We dug trenches on each side of the channel, at a distance sufficiently wide apart to hold the stream. These trenches varied in depth from down to the surface, or the bed of the creek, or the lower surface of the bed of the stream, to a greater depth as we ran into obstructions along the bank; that is, the bank varied and we laid, or dug the trenches in order to make a smooth surface; but in all parts of that course, the cribbing was as low as, or lower than, the bed of the stream. The trench was about four feet wide.

(Testimony of Allen Shattuck.)

Q. On each side?

A. On each side of the creek bed. And we laid a double row of piles in each one of these trenches the full length of the trench. We put cross-pieces on the trench of the same material, we spiked the cross-pieces to the piling and sawed off the cross-pieces on the inside of the cribbing sufficiently close to the cribbing to allow a smooth surface—the surface exposed to the creek—but left enough projection there so that the drift bolts that we drove in to secure the piles would hold, and then after these cross-pieces were nailed on, at a distance of about, I should say, ten feet, another row of piling was put on top of those, a double row of piling, and built on up to the height we wanted it and the space in between was filled with rocks and brush.

Q. Any sand bags in there?

A. Sand bags? There was some sand bags placed afterward. Those weren't placed on there at the time we built the bulkheads.

Q. Now, what was the length of the piling? Do you know anything about that?

A. Well, the length of the piles varied from fifty to a hundred feet. They were the best and longest piles we could get, because the longer the piles the more rigid the flume would be. [101]

Q. You got the longest piles you could?

A. Yes.

Q. You didn't build it with piles twenty-five or thirty feet long, as Mr. Wagner said?

A. I don't believe there were any piles in the

(Testimony of Allen Shattuck.)

flumes so short as that.

Q. What was the nature of the construction of the bulkhead where it emptied into the tide water?

A. It was built by driving the piles in the bank of the creek, and lining it on the inside with heavy planks in order to make a perfectly smooth surface inside.

Q. Now, what was the width, what was the distance between those two bulkheads on the banks of the stream?

A. On the upper course, they varied from thirty to thirty-five,  $37\frac{1}{2}$  and forty feet, and in the lower course, the bulkheads or the flume sides were about twenty-six feet wide.

Q. Why was that made twenty-six feet at the lower portion?

A. In order to enable the, or to confine the water to such an extent as would keep the bed of the creek clear. We thought that if we built the cribbing too far apart, it wouldn't confine the creek sufficiently to allow a swift enough flow to keep the bed of the creek clear, and the lower part of this part of the stream bed was composed mostly of finer gravel than the other part of the stream bed, necessitating a narrower channel in order to increase the flow enough to make it clear itself or keep itself clean.

Q. How far up the creek from the mouth of that did this bulkhead extend?

A. I don't understand.

Q. How far did it extend northerly? You might show the jury here, if you can. [102]

(Testimony of Allen Shattuck.)

A. The cribbing?

Q. The cribbed channel; yes, the cribbing, if it is shown on that.

A. Well, it extends up to near the middle of block 205.

Q. Now, do you know where the Gold Creek bridge was that was mentioned here?

A. There are two bridges across Gold Creek.

Q. Well, the Gold Creek bridge that is up here going to the cemetery.

A. That is beyond the limits of this.

Q. Now, did the cribbing extend up to the bridge?

A. No; it did not.

Q. Did it extend under the pipe line of the electric light company, mentioned by Mr. Stearns?

A. No; the upper Gold Creek bridge and the pipe line are several hundred feet beyond the limits of this map.

Q. Mr. Shattuck, I might ask you if prior to 1918, or prior to 1913, you ever had any trouble down there with water?

A. Well, the water often spread out and it ran over the whole lower part of the tract.

Q. I might ask you if you ever had any trouble with water on the easterly side or southeasterly portion of the tract?     A. Yes; we did.

Q. Where was that?

A. That was in the vicinity of Ninth Street—Ninth and B Streets.

Q. Point that out to the jury.



(Testimony of Allen Shattuck.)

A. (Pointing to chart.) Down in this vicinity here.

Q. Now, what was down there at that time, prior to 1913, in that vicinity, what buildings? [103]

A. The power plant of the Alaska Electric Light and Power Company was below that.

Q. Did you have any trouble with water over in that direction?

A. Yes, water often flowed down past it, in a channel past the light company's plant, threatening the light company's plant and the property of a man by the name of Mike Donaher that lived west of the light plant or a short distance from it.

Q. And did you do anything there regarding the water?

Mr. COBB.—I think I will object to that. It is irrelevant and immaterial. The point he is now testifying about is five or six hundred feet farther toward the bay. It seems to me that it is immaterial.

Mr. FAULKNER.—The point we wish to bring out is this: the plaintiff contends that the creek flowed to the westward. Now, the testimony is going to show that the main channel or creek didn't flow to the west, but that there was water going to the easterly side so that there was danger down there from floods, making it very material.

Mr. COBB.—As to water below there? The evidence is that after it got out of the canyon below the high banks, just below the canyon, it spread out all over the flats.

(Testimony of Allen Shattuck.)

The COURT.—His testimony, as I—

Mr. COBB.—(Interrupting.) I mean during flood waters; high waters, it spread all over that flat.

The COURT.—Objection overruled. Repeat the question. (Question repeated by reporter.)

A. Yes, it was necessary to put in a wing dam in the vicinity of Ninth and B streets to keep the water flowing down there and damaging property of the light company and the [104] building of Mike Donaher.

Q. Now, Mr. Shattuck, where is the lowest portion of that tract?

Mr. COBB.—What year was that? I didn't catch it.

Mr. FAULKNER.—How's that?

Mr. COBB.—What year was that?

A. We built them several times there prior to 1915.

Q. (By Mr. FAULKNER.) Who did that, paid for that work?

A. The owners of Casey-Shattuck Addition and the light company and Mr. Donaher did the work jointly.

Q. The Pacific Coast Company have anything to do with it?

A. I am not sure about the Pacific Coast Company; but they may have.

Q. Now, where is the lowest portion of the tract?

A. The lowest portion of the track is immediately toward the channel from the property of the Alaska

(Testimony of Allen Shattuck.)

Electric Light and Power Company.

Q. In which corner would that be, which direction?

A. That would be south of a point at the intersection of Ninth and B streets.

Q. Southeasterly?

A. It would be a little southeast; yes.

Q. Now, where were you, Mr. Shattuck, on the 26th of September, 1918? Were you here?

A. I was.

Q. Where were you that day?

A. In town the first part of the day and the latter part of the day I was out on the Casey-Shattuck Addition.

Q. What time did you get there?

A. The first time about nine o'clock in the morning.

Q. What did you observe at that time with reference to the [105] creek or the waters?

A. The creek was quite high, but it was practically all being carried by the cribbed channel.

Q. Practically all the water was in the cribbed channel? A. Yes.

Q. At that time. Did you see anything coming down at that time?

A. Not that time. I was only there for a moment or so.

Q. Now, where is Willoughby Avenue?

A. It runs to the seaward of the Casey-Shattuck Addition.

Q. Across the channel called the "cribbed chan-

(Testimony of Allen Shattuck.)

nel"? A. Yes, across the cribbed channel.

Q. And across what is marked on the plat as the "original channel"? A. Yes.

Q. Now, how long did you stay there when you went down the first time, in the morning?

A. Just a few moments.

Q. Then where did you go?

Q. I went down to the office and went to work.

Q. Did you return to the tract of land again?

A. Yes; about half-past twelve or quarter to one.

Q. What did you observe at that time with reference to the water?

A. I observed that the water was very high and doing a great deal of damage.

Q. Where was it going?

A. It was flowing down along both sides of and in the cribbed channel, mostly.

Q. And on both sides of the cribbed channel?  
[106] A. Yes.

Q. Now, was any water going on the westerly side of the cribbed channel at that time? A. Yes.

Q. I'll hand you a photograph, Mr. Shattuck, and ask you what that represents, if you know—what section of the country does that represent?

A. It represents the Casey-Shattuck Addition.

Q. And is the creek shown on there? A. Yes.

Mr. FAULKNER.—We'll ask to have that introduced in evidence.

Q. At what time does that represent the property, before the 26th of September, or after?

A. I'll have to look at it again.



(Testimony of Allen Shattuck.)

Q. What time? A. It was after the flood.

Mr. FAULKNER.—We'll ask to have that marked as plaintiff's exhibit.

(Received and marked No. 1, Plaintiff's Exhibit.)

Q. Now, Mr. Shattuck, I'll ask you to come down and show this picture to the jury and show the course on there, as nearly as you can, of the cribbed channel.

(Witness does so.)

Q. Where is the Gold Creek bridge? Just show to the jury where the Gold Creek bridge is.

A. Which Gold Creek bridge?

Q. Well, the one that goes to the cemetery?

A. It would be beyond the lower left hand corner of this exhibit.

Q. Then, where did the cribbed channel begin?

A. The cribbed channel began shortly, over at this corner and [107] and continued down the stream, down past Willoughby Avenue.

Q. Which way did it go? A. Toward the—

Q. Well, point it out with a pencil.

A. Yes. It went down approximately— The upper part of this cribbing here is shown on the westerly bank. On the easterly bank is a part of the original cribbing. The upper part of the cribbing, as shown on this exhibit, on the easterly side, is a part of the original bulkhead, and it went on down across this sand bar here (indicating). Here is another one. Ran down through and takes another course here (indicating), and went down in this direction here (indicating).

(Testimony of Allen Shattuck.)

Q. On which side of the house?

A. This is the course here (indicating). This is the lower Gold Creek bridge (indicating); from here down to the left of the house, down to Willoughby Avenue at this point.

Q. Now, when you got out there in the morning, you say there was water on both sides of the cribbed channel—I mean when you got out there about noon? A. Yes.

Q. What, if anything, happened up at the upper course of the cribbed channel, on the westerly bank before you reach the cribbed channel?

A. That bank washed out.

Q. So that going down the stream, I mean looking down the stream from the Gold Creek bridge, the right-hand bank, you say, had washed out before you reached the cribbed channel? A. Yes.

Q. Did the water flow over there at that time? [108] A. Yes.

Q. What was the nature of that bank; that country there?

A. That bank was covered with stumps and trees, indicating it had been there many years.

Q. Point out to the jury where that was?

A. That was along the lower left-hand corner of this picture, down to a point opposite the cribbing that is nearly opposite the cribbing that is shown on the easterly bank.

Q. Now, what structures are up there on that bank that washed out, if any?

A. Buildings formerly occupied by the Northern

(Testimony of Allen Shattuck.)

Laundry Company.

Q. And the area that you have marked there "washed out,"—the area that you pointed out to the jury?     A. Washed-out area?

Q. Yes.

A. That is the area that was formerly protected by the natural bank I spoke of.

Q. You say that was a high bank, with stumps on it?     A. Yes.

Q. About how big is that washed out area that is marked, if it is correctly marked, on this picture? I mean how far would that be from the creek over the upland side?

A. Oh, probably a couple of hundred feet.

Q. Couple of hundred feet which way?

A. From the location of the original bank towards the Northern Laundry Building.

Q. Down this way, then, would that be?

A. Well, approximately, across it, at right angles from the creek.

Q. Washed it out almost to the laundry, as shown on the picture? [109]     A. Yes.

Q. Now, what did you find out there, Mr. Shattuck? I might ask you this first: to what part of the tract did you go when you went out at noon that day?

A. I went down on Ninth Street, on the easterly side of the creek.

Q. Went out to Ninth Street?     A. Yes.

Q. On the easterly side of the creek?     A. Yes.

Q. Did you cross the creek?

(Testimony of Allen Shattuck.)

A. Not that time. I was across the creek during the day, later in the day.

Q. Were you on the same side of the creek as Mr. Eikland's house? A. Yes.

Q. How long did you remain there?

A. Oh, perhaps a half or three-quarters of an hour, possibly a little longer.

Q. Now, at that time could you see the bulkhead?

A. No; I could not.

Q. Why?

A. It was completely submerged with water.

Q. Both sides of it? A. Yes.

Q. Now, did you see anything coming down the creek at that time?

A. Yes; I saw a great deal of debris down there, coming down the creek.

Q. What did it consist of?

A. Logs and stumps and timbers. [110]

Q. Where did that go?

A. That went down the course of the stream and lodged at Willoughby Avenue.

Q. Now, I'll hand you another photograph and ask you what that represents.

A. That represents the jam of debris that lodged against Willoughby Avenue at the time of this flood.

Q. Is that picture dated?

A. I don't think it is.

Q. Well, the date is shown down in the corner, "3-12-19."



(Testimony of Allen Shattuck.)

A. I suppose that is what it is meant to be, March 12, 1919.

Q. That represents, then, the portion after the flood? A. Yes.

Mr. COBB.—What did he say it is?

Mr. FAULKNER.—It represents the lower portion of the Bulkhead next to Willoughby.

Mr. COBB.—Oh, that is the pile of debris that lodged down there?

Mr. FAULKNER.—Yes.

Mr. COBB.—Oh, no; we have no objection.

Mr. FAULKNER.—We'll ask that it be marked Defendant's Exhibit No. 2.

(Whereupon said photograph was received in evidence and marked Defendant's Exhibit No. 2.)

Q. I'll hand you another photograph and ask you what that is?

A. That represents the upper course of Gold Creek as it enters Casey-Shattuck Addition.

Mr. FAULKNER.—Just a minute, I want to show this to the jury. (Shows exhibit No. 2 to jury.)

Q. I might ask you where this picture was taken?

A. Taken from some point near the bridge, the upper Gold Creek [111] bridge.

The COURT.—The same as Defendant's Exhibit No. 1 in the other case?

Mr. FAULKNER.—Yes. We'll offer this as Defendant's Exhibit No. 3.

The COURT.—Yes.

(Whereupon photograph referred to was received

(Testimony of Allen Shattuck.)

in evidence and marked Defendant's Exhibit No. 3.)

The COURT.—That was taken from what you call the Gold Creek bridge?

The WITNESS.—The upper bridge.

The COURT.—Yes. On the road going out to the cemetery?

The WITNESS.—Yes.

Mr. FAULKNER.—I think we better refer to that as the Gold Creek Bridge and the other as the Ninth Street bridge, or Tenth Street bridge.

Q. Now, on this photograph, which is marked Defendant's Exhibit No. 3, there is a portion of the cribbing shown there on the right-hand side, when was that put there?

A. That was put there after the flood.

Q. After the flood?      A. Yes.

Q. And at the time of the flood, September 26, 1918, did the cribbing extend up to that point?

A. No.

Q. Will you take a pen and make the letter X on the top of the building you have described as the Northern Laundry?

(Witness does so.)

(Photograph shown to jury.)

Q. I hand you another photograph, Mr. Shattuck, and ask you what that represents, if you know?

A. That represents a section of the Casey-Shattuck Addition near [112] the native hospital.

Q. Is that near the mouth of the creek?

(Testimony of Allen Shattuck.)

A. It is.

Q. When was that taken?

A. That was taken subsequent to the flood.

Q. Any objection to that, Mr. Cobb?

Mr. COBB.—Yes, I object to this. Just let me ask one question. This is seven or eight hundred or a thousand feet below, downstream from the property of Mr. Eikland?

A. It is several hundred feet.

Mr. COBB.—How's that?

A. Yes, sir; it's several hundred feet below the property that was damaged.

Mr. COBB.—It is irrelevant and immaterial to any issue in this case; doesn't illustrate anything that is material to the inquiry.

Mr. FAULKNER.—The purpose of it was to show what caused the jam. Witnesses have testified about a jam.

The COURT.—About the narrowness—

Mr. FAULKNER.—Yes. And Mr. Eikland's house, that was 500 feet from his property.

Mr. COBB.—Well, that is only an estimate.

The COURT.—Objection overruled.

Mr. FAULKNER.—That will be Defendant's Exhibit No. 4.

(Whereupon said photograph was received in evidence and marked Defendant's Exhibit No. 4.)

Q. I'll hand you another photograph, Mr. Shattuck and ask you what *what* represents?

A. It represents a section of the Addition near the intersection of Ninth and B Streets. [113]

(Testimony of Allen Shattuck.)

Q. Before or after the flood?

A. After the flood.

Q. Of 1918?      A. Of 1918.

Q. Where was Mr. Eikland's house with reference to that picture, if you can show it?

A. It was back of the picket fence shown on the right-hand side of the picture.

(Whereupon the foregoing photograph was offered and received in evidence and marked Defendant's Exhibit No. 5.)

Q. (By the COURT.) I want to ask you just one question. I think that (exhibiting) is the same picture, isn't it?      A. Yes.

Q. Is that the flume running down there?

A. Down here?

Q. Yes, by the picket fence?

A. No; that is the bed of the creek after the flood. That is a portion of the sidewalk in front of the fence.

A JUROR.—Was this bulkhead built after the flood?      A. Yes.

A JUROR.—It had been built after the flood?

A. That was all built after the flood.

The COURT.—Now, I just want to ask another question. Did the house of Mr. Eikland—was it situated back of this fence or was it situated directly back of where the sidewalk is?

A. This fence at the right-hand corner of the picture, extreme right-hand corner of the picture, where the fence is shown, is practically the corner of Mr. Eikland's lot and his house sat back of that



(Testimony of Allen Shattuck.)

fence, toward the left. That is, his lot was a fifty-foot lot and this (indicating) is one corner of [114] it. The other corner extended over here, toward where the creek is shown.

The COURT.—Toward the lower end of the sidewalk?

A. Yes; and his house sat toward the middle of the lot.

Recess until 2 o'clock P. M. this day, Nov. 14, 1922.

2 o'clock P. M., Nov. 14, 1922.

Court met, pursuant to recess.

ALLEN SHATTUCK (on stand).

Direct Examination (Resumed).

(By Mr. FAULKNER.)

Q. Mr. Shattuck, I asked you this morning about the construction of the bulkhead. Now, who did that work?

A. A man by the name of Ole Opsahl was employed to do the actual construction work.

Q. Who was Opsahl? Just what was his business? A. He's a man who—

Mr. COBB.—We shall object to that as irrelevant and immaterial. Doesn't amount to anything. It's a preliminary question, but it may be eliminated. I presume counsel will follow it up with testimony to show that he was competent.

Mr. FAULKNER.—The purpose of the question is to show what was done. The gist of the action

is whether the defendant was negligent in the construction of the bulkheads. Now, Mr. Shattuck, not having built it, we want to find out what steps he took to procure a man that was competent, what he did. I think the same matter was admitted at the other trial.

The COURT.—I'm inclined to think that the objection should be overruled. [115]

Mr. COBB.—Will the Court hear me just a minute?

The COURT.—Yes.

Mr. COBB.—This is not a case of fellow-servant or any pretense to it.

The COURT.—No.

Mr. COBB.—The gist of the action is not, as stated, negligence on their part. There is an element of negligence enters into it, but as to the care which the plaintiffs were under a legal obligation to use, it was a personal duty which they could not delegate to somebody else and say that they had exercised due care in selecting him and thereby escape liability. Now, it is immaterial whether he was a careful man or not. If they were negligent, why they are responsible for it. In other words, it is a nondelegable duty. The purpose of this testimony is to show that they had exercised due care regarding a man by the name of Opsahl.

The COURT.—That may be so under one view of the case, but under the testimony which you have introduced thus far, you have shown faults both in the construction of the flume, the manner of the

(Testimony of Allen Shattuck.)

construction of the flume as well as the size of the flume, and that is the actual personal manner of constructing the flume.

Mr. COBB.—Yes.

The COURT.—That it consisted of logs; that the logs didn't go to the bottom of the stream and also that the logs were not properly tied together. Necessarily, that must have been delegated by the man that caused it to be constructed to his employees. There is also another element as to the physical manner of construction, with reference to whether it was [116] narrowed at the mouth and whether that in itself caused obstructions in the flume which in turn caused it to overflow. So there is a double view of it the jury must take as to the question of negligence; and also the question of whether the flume was constructed carefully enough. There have been several statements of negligence heretofore developed, but the testimony is, I think, under the circumstances, especially important for the defendants to show that they employed due care in getting the proper man to construct the flume. In that regard I think the evidence is material.

Mr. COBB.—The point of our objection is that it is a duty they could not delegate—

The COURT.—(Interrupting.) Objection overruled.

Mr. COBB.—We'll except.

A. Opsahl was a man whom we believed, from his reputation, to be—

(Testimony of Allen Shattuck.)

Mr. COBB.—(Interrupting.) We object to his stating what he believed. That is simply a matter of opinion, unless there is some foundation.

The COURT.—Yes, he may state what he did find out, whether he was qualified to build a flume of that nature.

Q. Where did he come from?

A. Came from Montana.

Q. What was his business?

A. Building flumes of the character of this one that we wanted to build and other work.

Q. Where did he live when he lived in Juneau?

A. He lived out on the Addition.

Q. Down near Gold Creek? [117]

A. Yes, on the westerly side of Gold Creek, near its middle course.

Q. Now, Mr. Shattuck, at the time the Bulkhead was constructed, did you measure any other channel to determine its capacity? Was there any other channel and did you measure it?

A. There was not. We felt that we couldn't get any information that would be of any value to us, in building the bulkhead of the size necessary to carry the water.

Q. Now on the day of the flood on September 26, 1918, you stated that the water cut over on the westerly bank of the stream, as it came out under the Gold Creek bridge towards the laundry.

A. Yes.

Q. What is the nature of that place there, if you know, where the stream went over the westerly



(Testimony of Allen Shattuck.)

bank there before it reached the bulkhead? What did it do there?

A. It cut away the natural bank on that side of the stream.

Q. What was on that bank?

A. Stumps and a growth of brush and so on.

Q. Was it a permanent bank?

A. From all appearances, yes. It had been there for a good many years.

Q. Do you know how deep the water cut in there? A. Vertical depth, or?

Q. Yes. A. I should say eight feet.

Q. What did it leave there on the bottom?

A. Rocks and gravel.

Q. As shown in the picture? A. Yes. [118]

Q. Now, you say—I think you testified this morning that there was water running on both sides of the cribbed channel at the time you went down there at noon? A. Yes.

Q. Where did that water go that was on the westerly side of the cribbed channel?

A. Most of it followed the course of the cribbed channel?

Q. Down in this (indicating) direction?

A. Yes.

Q. Did any of it go any other direction?

A. Some of it went in the direction of the new channel, as marked on that exhibit.

Q. On the westerly side?

A. On the westerly side, yes. Some of it went down Eleventh Street.

(Testimony of Allen Shattuck.)

Q. Now, was there any damage done down on Eleventh Street, or down on Tenth Street, I mean, towards—

Mr. COBB.—We object to that as irrelevant and immaterial.

Mr. FAULKNER.—Well, the testimony of Mr. Eikland was that there was no water went on the westerly side of Gold Creek and we want to show that there was. Mr. Shattuck has testified that there was water on both sides of the cribbed channel. We want to show the general nature of the flood.

The COURT.—Objection overruled.

Q. What if any damage was done down there?

A. There was some damage done on E Street—

Q. On what?

A. On E Street, which is an extension of Wiloughby Avenue.

Q. Oh; that is, clear down towards the tide flats?

A. Yes; at the intersection of E; at the intersection of Tenth [119] and E and Eleventh—at both these locations—some damage done at each of those places by water, to houses.

Q. Whose houses were they?

A. One of them belonged to a man by the name of Sullivan and the other to Mrs. Kabler, who is now Mrs. Frank Forrest.

Q. What was the situation on E Street at the time of the flood with reference to the water?

A. Water flooded E Street at several points; crossed it on Tenth Street, and on Eleventh Street

(Testimony of Allen Shattuck.)

it crossed it and the depression on the easterly side of these streets was all filled with water.

Q. What was the damage done? What did it do to Mr. Sullivan's house?

A. Well, it only flooded his house. It didn't carry his house away.

Q. What did it do to Mrs. Kabler's house?

A. Ran through the basement of the house and did some damage from flooding.

Q. I think you said you went down there about twelve o'clock on the 26th of September?

A. Yes; the second time.

Q. The second time, yes. Where did you go? Did you cross the Gold Creek bridge at that time?

A. No—

Q. (Interrupting.) That is, the bridge here?

A. No; I did not. I went to the easterly side, or westerly side of the creek by way of Willoughby Avenue, when I went over there. Most of the time after Eikland's house went out, I went down Willoughby Avenue and assisted people in moving out of that section. [120]

Q. That was after Mr. Eikland's house went out?

A. Yes.

Q. But before his house went out, where did you go?

A. The only place I was at prior to and up to the time that Mr. Eikland's house went out was the ground in the vicinity of Ninth and B Streets. I went from my house down to the location of the

(Testimony of Allen Shattuck.)

Eikland house and was there until his house went out.

Q. You remained there until his house went out?

A. Yes.

Q. What was the nature of the stream there at that point?

A. Very heavy flow of water all through the flats there from the location of Eikland's house on up beyond the west side of the flume.

Q. What was in this area marked "new channel" and "Washed-out area"?

A. The stream was going through there.

Q. What was in the stream?

A. Debris of all kinds—logs and stumps, bridge timbers and pieces of cabins.

Q. Was there any of that sort of debris in the water, that you noticed, on the westerly bank of the cribbed channel?

A. I couldn't see that far over there.

Q. Did you observe, at any time afterward, anything that was coming down the westerly side of the cribbed channel?

A. Some debris there, but most of it lodged, lodged between what was the mouth of the old original channel and the outlet of the cribbed channel.

Q. Well, I hand you Defendant's Exhibit No. 4 and ask you if you see anything there that came down with the flood? [121]

A. Yes; that represents a great lot of debris that collected in the vicinity of the outlet of the flume.



(Testimony of Allen Shattuck.)

Q. Did any of it collect beyond that, on the westerly bank of the cribbed channel?

A. Yes, collected all along the upper side of Willoughby Avenue as far as the outlet of what is marked on plaintiff's exhibit there as the "original channel."

Q. And here is Defendant's Exhibit No. 2. I will ask you if you see any debris and rubbish on that that went down on the westerly bank of the flume, of the cribbed channel?

A. Yes; yes, that shows the condition of the country above, on the northerly side of Willoughby Avenue, from the outlet of the cribbed channel to approximately the location of the outlet of the original channel on Plaintiff's Exhibit "A."

Q. Now, do you know where the Gold Creek bridge is—what we refer to as the Gold Creek bridge, Mr. Shattuck?     A. Yes.

Q. Where was it? You located it this morning, I believe.

A. Beyond the limits of that Plaintiff's Exhibit "A"—several hundred feet.

Q. What happened to that bridge?

A. It went out.

Q. After you left Mr. Eikland's house on the easterly bank of the channel, where did you go then?

A. Well, I am not positive as to which direction I went; as I stated before, I spent most of the balance of the day, when I was out there, assisting people who wished to move, who were located on

(Testimony of Allen Shattuck.)

Willoughby Avenue, but during the afternoon I was up to the site of the bridge after it went out.

Q. Before we come to that—you say you went down Willoughby [122] Avenue from Mr. Eikland's place? A. Yes.

Q. Did you go to the vicinity of the hospital?

A. Yes.

Q. What, if anything, did you observe there?

A. I observed people who were interested in the hospital, taking people out of the hospital in row-boats, or trying to get them out without drowning them.

Q. Did you see me there that day?

A. Yes; you were there.

Q. Did you see how we got the people out of the hospital?

A. Why, there was a rope stretched, as I recall it now, and they worked each boatload of people along that rope.

Q. How deep was the water around the hospital? Was it so you could get to the hospital by land?

A. No.

Q. At any point? A. No.

Q. Now, will you point out to the jury just where the hospital is?

A. Located on block 220, on what is marked as "school reserve" on plaintiff's exhibit—

Q. On which side of the cribbed channel is that?

A. Westerly side of the cribbed channel.

Q. Where did you go from there, Mr. Shattuck?

A. After we got through moving people on Wil-

(Testimony of Allen Shattuck.)

loughby Avenue, I walked around to different points or parts of the Addition, to see what damage had been done in the different sections, and I was around there generally that afternoon.

Q. Did you go down on E Street? [123]

A. Yes; we have property on E Street, and I went down there to see what damage had been done down there.

Q. Did you come back to the Gold Bridge again?

A. Yes.

Q. What did you observe then?

A. The bridge had gone out. I went over there with Mr. Behrends.

Q. How long had this bridge been there?

A. Been there since some time in about 1914. It was comparatively a new bridge.

Q. Was there a bridge there prior to 1914?

A. Yes.

Q. What was done to that bridge?

A. I don't recall what happened to that bridge, but it was replaced with a new bridge, the bridge that I speak of. Just what happened to the old bridge, I don't know.

Q. How long had it been there?

A. The old bridge?

Q. Yes.

A. Been there since I came to the country in 1897.

Q. You don't know whether it was taken out, torn down, or taken out by a flood?

A. No, I don't recall that.

(Testimony of Allen Shattuck.)

Q. You don't know where it went to? A. No.

Q. Did you observe any other damage that was done that day in Juneau by this flood? A. Yes.

Q. What?

A. Well, there was considerable damage over on what is known as "Swede Hill." [124]

Q. What was done there?

A. A number of houses slid off the sidehill, washed off the sidehill from the flood of water that came down there. Some of the houses had been there for a great many years, at least they had been there since I came to the country. There was some damage on the edge of a little basin up near the intersection of Seventh and Gold Belt Avenue, up where Charley Garfield's house is and Fred Wettrick's house is. Some dirt slid off; considerable movement occurred there.

Q. What was done there?

A. A slide, a landslide occurred there and undermined Mr. Garfield's house.

Q. Now, you say the houses on what is known as Swede Hill were there since you came to the country? A. Yes.

Q. How long have you been here?

A. I came here in 1897.

Q. Do you know how many of those houses were washed down that day?

A. Oh, there were, I should say, four or five in this one place.

Q. Now, did you observe any damage done to the Gastineau Hotel that day?



(Testimony of Allen Shattuck.)

A. Yes the slide I speak of went into the back end of the hotel and the mud and water went through the hotel and came out in front, doing damage, a great deal of damage.

Q. Down through the stairs, the stairway?

A. Yes; right through the hotel, from back to front.

Q. Do you know of any other damage that was caused by Gold Creek farther up? [125]

A. There was a lot of damage done on the road, on the basin road.

Mr. COBB.—Were you up there, Mr. Shattuck?

A. Yes, sir; I was up there, from the turn in the road shortly beyond the city limits, up to Jualpa basin at the Gold Creek bridge.

Q. What was the nature of that damage?

A. There were slides that had taken out the road and the water company's flume and everything that was within reach of it.

Q. What was the nature of the water company's flume that went out that day?

A. I don't— There's two flumes there, one carrying the waters of Gold Creek and one carrying their own water to the water system. Which one of those do you mean?

Q. Either one.

A. Well, it took it out wherever a slide came down, which was in a number of places. It took out the flume that supplies water to the city.

Q. You say there was another flume there?

(Testimony of Allen Shattuck.)

A. There was a flume to carry the waters of Gold Creek across their springs.

Q. That carried the whole waters of the creek?

A. Yes.

Q. What was the nature of that flume? How was it constructed?

A. It was constructed of concrete and lined with timbers.

Q. Do you know the size of it?

A. Well, not accurately.

Q. Was it as big as the bulkheads— Did it have as much capacity as the capacity of the stream marked “cribbed channel”?

A. I should say not. [126]

Q. Do you know how much lumber it was lined with? A. No.

Q. And you say that went out? A. Yes.

Q. Now, Mr. Shattuck, you said you came here in 1897 and I think you testified that you lived in sight of Gold Creek? A. Yes.

Q. All that time?

A. Not all that time, but since about 1902, or '03.

Q. Since 1903? A. Yes.

Q. Have you observed the periods of high water in Gold Creek during that time? A. Yes, I have.

Q. Have you observed the rainfall during that period?

A. Yes; in a general way; not otherwise.

Q. Now, you say you used that tract of land out there for a cow pasture for some time?

A. For a number of years?

(Testimony of Allen Shattuck.)

Q. You yourself?      A. Yes.

Q. Have you been there frequently, over the addition?

A. I have occasion to go over it nearly every night to drive the cow home.

Q. Had you ever, up to that time, seen as great a flood in Gold Creek as there was in September, on the 26th, 1918?      A. I have not, by any means.

Q. Did you ever see as great a rainfall as there was on that day?      A. I have not. [127]

Cross-examination.

(By Mr. COBB.)

Q. Mr. Shattuck, you have been interested in the tract of land that constitutes the Casey-Shattuck Addition, you say, since 1903?      A. Yes.

Q. And from that time up until it was subdivided into lots in 1913, it was used as a cow pasture?

A. A good part of the time.

Q. No buildings on it, was there?

A. Well, not many. Mr. Calhoun had properties out there.

Q. Well, that was away up on the bank?

A. No; that was on the easterly side of Gold Creek, but on the flats.

Q. But on the higher portion of the flats. There was nothing on the lower portion of the flats.

A. It was about the same elevation as Mr. Eikland's house.

Q. How's that?

(Testimony of Allen Shattuck.)

A. I say, it was about the same elevation as Mr. Eikland's house.

Q. Practically the same elevation as Mr. Eikland's house. Now, during that period of time you have seen all the flats there, southerly and westerly of where Mr. Eikland's house was built, covered with water? A. No.

Q. Never saw it? A. No.

Q. Never saw the channels across there overflow?

A. Yes; the channels overflow and the water went on out in different directions, but I never saw the whole flats covered.

Q. Well, when there was flood waters in the creek and it passed [128] through the high banks, which you admit in your answer, confined the stream, opposite Eikland's house, as it did down there, it went down through a number of channels, wherever the ground was the lowest?

A. Sometimes it went through one channel and sometimes through another.

Q. Sometimes through several channels?

A. Yes.

Q. There was plenty of room for it to get away?

A. It did get away.

Q. Didn't back up anywhere. It's about a two per cent grade from there down to the sea, isn't there? A. I don't know that.

Q. Considerable grade? A. Yes.

Q. Now, then, what time in 1913 was it that you had this subdivided?

A. Well, I haven't the exact dates, but I am un-



(Testimony of Allen Shattuck.)

der the impression that it was in the winter and spring of 1912 and '13.

Q. I hand you here a blue-print and ask you what that is?

A. That is a print of the Addition.

Q. Was that the blue-print that was acknowledged by the owners and filed as a correct subdivision of the land?     A. Yes, sir.

Q. Just state to the jury the date of the acknowledgment of it.

A. Eleventh day of August, 1913.

Q. What date did you sell the lot to Eikland? Eikland bought lot 6 in block 209.

A. I don't know, Mr. Cobb. I haven't had the time to look that up. [129]

The COURT.—I think that it is shown in the pleadings.

Mr. COBB.—Well, it's not material as to the exact date. He doesn't recall it.

Q. He bought that year?     A. Yes.

Q. And he bought after the subdivision was made?     A. Yes, I believe he did.

Q. Now, at that time Gold Creek, as shown by your own map, ran right along by the original, where the original channel is shown on Plaintiff's Exhibit No. 1 ran?     A. Yes.

Q. Where the creek ran?     A. Yes.

Q. Now, when you had your subdivisions made you had the whole creek bed of the channel, the old original channel there, platted, hadn't you?

A. No.

(Testimony of Allen Shattuck.)

Q. It isn't platted?

A. Water flows through the addition—

Q. (Interrupting.) How's that?

A. But that doesn't represent the whole course of the stream.

Q. Well, did it leave any part of the ground where the water ran unplatted?     A. No.

Q. It's all platted into lots and blocks?

A. Yes.

Q. After you constructed the flume, or bulkhead channel that was taken out in 1918, all the ground that was platted was put upon the market and offered for sale, wasn't it?     A. Yes. [130]

Q. Now, then, Mr. Shattuck, when you built that, or shortly after you built the channel— Just step down here a moment. I want you to point out on this map as near as you can, about where your cribbed channel was afterwards built.

A. (With plat before jury.) I know it started up somewheres down near the intersection of A and Eleventh Streets, a little farther north at the beginning of the west side of the cribbed channel. The east side extended a little farther up the creek, probably forty or fifty feet, then went down through—on the west side, it went down through a corner of lot one, block 208, across the intersection of B and Tenth Streets, near the northwesterly corner of block 209, went beyond the alley and made a turn on the northwesterly side of lot 8, block 213. From there it went straight to the channel, the Gastineau Channel, in a southeasterly direction.

(Testimony of Allen Shattuck.)

Q. It crossed the westerly end of what is marked here "Electric Light & Power Company S. A. home-  
stead claim"? A. Yes.

Q. And you got a deed from the electric light and power company to the ground that you put your—

A. (Interrupting.) Yes; made some sort of exchange.

Q. Made some sort of exchange and got title to it from them to put your flume across it?

A. I believe that was the idea we had in making the exchange.

Q. Well, you did get title from them to bring the flume across there?

A. Well, the flume cut across the westerly end of their tract and left them a fraction of land on the corner, and we had a fraction that we—  
[131]

Q. (Interrupting.) Well, you did that to—

A. (Interrupting.) I'm telling you that the object of our making that transfer was to make their property solid and to make our property solid.

Q. But your object had been also to put your flume across it? A. Yes—

Q. And you got that right, didn't you?

A. I expect we did. I don't recall now.

Q. And then you exchanged the fractions?

A. Yes.

Q. Now, then, I want you to point out on this—  
First I'll offer this in evidence in conjunction with the cross-examination, and ask to have it marked.

The COURT.—Well, is that the official plat?

(Testimony of Allen Shattuck.)

Mr. COBB.—Yes; it has been an exhibit in the case ever since—

Mr. FAULKNER.—We haven't any copy of it.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "F.")

Q. Now, then, I want you to point out on this map, Plaintiff's Exhibit "F," Mr. Eikland's property, the lot which you sold him?

A. Lot six, block 209.

Q. Did you ever see that lot before you sold it to him?     A. Yes.

Q. It was high ground, wasn't it?

A. Well, I won't say.

Q. That is, compared with the ground this way (indicating)?

A. The country was practically all the same elevation.

Q. Was it as low an elevation as the property down where the creek was running? [132]

A. No, the slope of the country was down towards the beach.

Q. It was covered with big stumps; had a lot of big stumps on it?

A. It might have had stumps on it. Most of that ground that was not in the creek-bed had stumps on it, but I don't know particularly about Eikland's lot.

Q. There wasn't any channel across here, going over all but five feet of its northeasterly corner, was there?     A. No.



(Testimony of Allen Shattuck.)

Q. That was all done afterwards, as shown on Plaintiff's Exhibit No. 1.

A. There wasn't any channel cutting Eikland's lot at the time we sold it.

Q. Now, opposite this, and directly in the rear of it, there is a cut bank, diverting the stream there, wasn't there? A. Where?

Q. Directly in the rear of lot six, block 209?

A. Well, I don't know just what you mean by a "cut bank."

Q. Well, there was considerable depth to the bed of the stream there?

A. Well, I wouldn't say—a couple or three feet, something like that.

Q. Wasn't it more than that?

A. I don't believe so.

Q. You never measured it? A. No.

Q. But in your pleadings you admit that it was protected from all flood waters, ordinary floods, such as are likely to occur here? Is that correct?

A. As to what time? [133]

Q. The time you sold it to him? A. Yes.

Q. Now, how was the bank on the westerly side of the creek there to the rear of block 209, across—for the sake of the record—across Tenth Street, block 209; how was the bank there?

A. You mean up in the northwesterly direction?

Q. Right up here (indicating). Take this map. Right along there, say, from the corner—

The COURT.—Between what streets, A, B or C?

Q. (Continuing.) Of lot 1, block 213, at the in-

(Testimony of Allen Shattuck.)

tersection of Tenth and—what street is that?

A. B.

Q. B Street. From there on up past block 208, along this course here (indicating)?

A. Well, from a short distance back of Mr. Eikland's lot on out to the place you have mentioned there, it was composed of various creek channels. There's a creek channel running immediately behind Mr. Eikland's lot and there is another creek channel shown on this map.

Q. You claim there is an old creek channel across block 209?

A. There is; yes. There is a creek channel across block 209.

Q. Across Mr. Eikland's property?

A. No, but there is land immediately behind Mr. Eikland's property ninety feet in depth that was cut down to a fractional lot. The old creek bed ran immediately behind the Eikland lot.

Q. Now, then, you built your bulkhead on that part of the stream lying back of block 209, practically all of the original channel, didn't you—just confined it to the [134] original channel?

A. We confined it to one of the original channels.

Q. Well, the one that the water was running in?

A. Part of the water was running in it.

Q. There was no water, at ordinary stages of water in the creek, running through the whole channel (indicating) that you speak of, was there?

A. Well, yes, at ordinary stages of the tide, of the creek of the stream flow, there was some water run-

(Testimony of Allen Shattuck.)

ning down there, and when the water got higher, there was more water running down there.

Q. This was the main stream, as indicated on this Plaintiff's Exhibit "F"?

A. The main stream at the time this map was made, but not at the time the flume was built.

Q. The flume was built in 1914? A. Yes.

Q. What had changed it in the meantime?

A. The flood.

Q. How much did it change it?

A. Well, it changed it to the extent of filling the old channel up and the water was compelled to find another means of outlet.

Q. Where did it fill the old channel up?

A. Practically in the course that is marked on this map.

Q. Well, what part of it?

A. Well, it didn't fill the upper part of it because it flowed very swift there. It filled from approximately the intersection of Tenth and B Streets.

Q. Approximately from the intersection of Tenth and B Streets. [135] From there on down was it filled?

A. It wasn't all filled, but it was filled so that the water didn't follow that course. There are several places, high places, bumps, where the water forced the gravel into hummocks.

Q. It hadn't changed the channel, however, right back of block 209 appreciably, had it?

A. Well, back which way?

(Testimony of Allen Shattuck.)

Q. Northerly, right the block on Tenth Street, block 209.

A. That would be almost back of Mr. Eikland's lot.

Q. Yes.      A. The intersection of Tenth and B.

Q. It hadn't changed appreciably; it hadn't appreciably changed the channel there?

A. It had from the intersection of Tenth and B.

Q. From Tenth and B.

A. Yes; that is almost directly back of Mr. Eikland's lot. That is where the fill started in. The ground from there down to the beach is not quite so steep.

Q. Well, is block 213 as high as this lot of Mr. Eikland's property?

A. Well, it is about the same elevation, most of it. Of course, where the creek channel runs through, it is a little lower, but the upper part is about the same.

Q. Don't you know that it is a good deal lower—seven or eight feet?      A. No; it isn't.

Q. You don't except this corner here?

A. No; I know that isn't.

Q. And you mean to tell the jury that the ground in block 213 [136] is as high as Mr. Eikland's property?      A. Before the flood; yes.

Q. Before the flood. All of it?

A. No, I didn't say all of it. I say all that part of it not affected by the stream channels that ran through there.



(Testimony of Allen Shattuck.)

Q. How much of it was affected by the stream channels?

A. Well, probably half the entire block.

Q. Half of the entire block?

A. Yes, it spread all out.

Q. Spread across there?

A. Wider than it is indicated there.

Q. And this (indicating) corner was the highest part of it—the southeasterly corner?

A. Yes; at the time we sold it, that was the highest part of it.

Q. Now, where is Mr. Nelson's property?

A. Lots nine and ten, block 213.

Q. That is lot nine and ten, 213. Where was the Ingman property?

A. Ingman property is three, in 209.

Q. Three in 209?      A. Yes.

Q. I understood you to say, on your direct examination, that there was an old channel running across—before you built the flume—running across, in what is practically now marked by Mr. Stewart on his map as the “new channel”?

A. Not so far out.

Q. How is that?

A. Not so far out. The new channel was out by the flood.

Q. Yes.

A. The old channel there ran down in this vicinity (pointing); [137] ran near that point, the northwest point of Mr. Eikland's lot, but not into the lot.

(Testimony of Allen Shattuck.)

Q. Now, the ground, after the flood was over, will you point out on here about approximately where Mr. Eikland's house set?

A. Oh, somewhere near the middle, I should say, of lot six, block 209. I know he has some ground back of his lot and some in front.

Q. That was all cut out except six or seven feet, and his house all taken away? A. Yes.

Q. Now, then, you had an exhibit here in which you showed some ground over on the westerly side of it that washed out at the same time. Was that above or below the upper end of the flume?

A. Well, it was above the upper end of the flume and the upper end of the flume also was washed out.

Q. The upper end of the flume. How much ground was washed out over there?

A. Well, a great deal of ground.

Q. How's that? A. A great deal of ground.

Q. What do you mean by "a great deal of ground"?

A. What do you mean by "how much land was washed out"?

Q. I want you to tell the jury about how much space was washed out, on the west side.

The COURT.—You want the actual—

Mr. COBB.—The actual feet, as near as you can.

A. Vertical depth?

Q. No; the area.

A. That is difficult to tell. The flood started to cut the [138] westerly bank beyond the limit of

(Testimony of Allen Shattuck.)

the Addition, and when it cut down the natural bank there and struck the flume, it naturally took the flume out and then spread out a distance of possibly two hundred feet in width there, between the easterly bulkhead and the bank that was left on the northwest, over toward the Northern Laundry Building.

Q. Well, the widest place was below where your bulkheads began—couldn't have been much above it.

A. No, the widest place was below where the bulkhead—

Q. (Interrupting.) And all that part of the bulkhead was taken out? A. Yes.

Q. You know what became of the logs?

A. Well, they washed away.

Q. You don't know whether they jack-knifed up there. They were all bolted together?

A. They were drift-bolted.

Q. Drift-bolted. You don't know whether they jack-knifed and threw the current over, deflecting over it here (indicating)?

A. You couldn't see that. There was too much water.

Q. There was too much water. You didn't observe the diverted water swirling to one side and cutting out the bank?

A. No, I didn't see that.

Q. You stated this morning that the flume is from, or was from thirty-five to forty-five feet wide? A. Thirty to forty feet.

(Testimony of Allen Shattuck.)

Q. Didn't you say thirty-five to forty-five feet, until you approached the lower end of it; then it was narrowed, you said, to twenty-six. A. Yes.

[139]

Q. Now, you stated a little while ago, that at a point here (indicating) almost directly at the west end of the tract of land marked "Light & Power Company's S. A. homestead claim," that was where the mouth of your flume was?

A. The westerly side of that.

Q. The westerly end, right here (indicating).

(Witness points out point on map.)

Q. Approximately right across that westerly end, the end of that tract.

A. The end of the tract. This is the westerly end (pointing).

Q. Oh, I thought this was it across here (indicating.)

A. It struck that tract near where C Street strikes it.

Q. Now, you described the debris that the flood collected near the, between the mouth of the flume and the mouth of the old channel here. A. Yes.

Q. You did not see any beyond that?

A. There is any of any consequence beyond that; some of the walk—

Q. (Interrupting.) Well, you didn't notice any debris collected up there? A. Just a little.

Q. Just a little. Nothing from the stream proper?

A. Well, there was something that the stream



(Testimony of Allen Shattuck.)

washed down there, above the sidewalk at that end of the Addition, but the greatest amount came down here (indicating).

Q. You were down there, you say, on that morning, the 26th of September?

A. I was down there about nine o'clock in the morning the first [140] time.

Q. Did you notice the time that your entire flume on this flat, for six or seven or eight hundred feet, was choked up? A. At that time.

Q. Did you notice when it was?

A. Well, it was choked up for some distance above Willoughby at the time I went out there in the afternoon.

Q. And kept filling?

A. No, after it was filled back a little ways, it went over in another direction.

Q. The flow of water to the sea was completely obstructed? A. I think so.

Q. And no stream could get through there?

A. No.

Q. And the only way that the water coming down the creek could escape was to flow over your flume where it was broken and seek its outlet down that way? A. Yes.

Q. That was all that happened? A. Yes.

Q. If your flume had had sufficient capacity to take care of the water and the debris, it wouldn't have choked that way and any debris coming down there wouldn't—

(Testimony of Allen Shattuck.)

Mr. FAULKNER.—I object to this question—argumentative, purely.

The COURT.—Yes.

Q. Well, you needn't answer that. Anybody can see that.

The COURT.—Objection sustained.

Q. When you built the flume first in 1914, you built the [141] bulkhead across what is marked as the "original channel" on Mr. Stewart's map and as shown up the main creek bed on Plaintiff's Exhibit "F"?

A. We didn't build it across any channel. We built it along the course part of the stream was taking at the time.

Q. You may put it that way. You did build the bulkhead, as shown in Plaintiff's Exhibit "A," between the alley in block 208 and down across Tenth Street, which Mr. Stewart testified is still there? A. Yes.

Q. You built it there? A. Yes.

Q. That was carried out?

A. I'll say that we built that originally. It was strengthened by the city.

Q. That was carried out in 1915, wasn't it?

A. That bulkhead?

Q. Yes. A. No.

Q. Part of the bulkhead was carried out in 1915?

A. No.

Q. Wasn't that strengthened some?

A. Some of the bulkhead here, on lot 8, block 213, that is where you probably mean. The water

(Testimony of Allen Shattuck.)

washed under there and caused a lot of the filling that we had put in under the rows of piles to disappear, and we strengthened that by putting slabs in there and by filling it again, but there was no part of the bulkhead went out.

Q. Well, that part of the bulkhead that I have referred to stood the storm of 1918, didn't it? [142]

A. It was there; it is there yet.

Q. Didn't go away? A. No.

Q. But the bulkhead on the opposite side, adjacent to Mr. Eikland's property, did go out?

A. Well, a part of the bulkhead across, on the opposite side, didn't; no.

Q. Yes. Well, a piece of it stood, but the bulkhead—

A. (Interrupting.) There's some of it here (indicating).

Q. But the bulkhead between the westerly side, or southerly side of lot ten in block 208, on down nearly across Tenth Street, did go out. A. Yes.

Q. Now, when did you people first agree to put that in? A. First determined to put it in?

Q. First determined to put it in; yes.

A. I don't know; I don't recall.

Q. You don't recall? A. No.

Q. Some time before it was put in, naturally?

A. Yes.

Q. And who planned it?

A. Well, it was planned by the owners of the

(Testimony of Allen Shattuck.)

Addition—Mr. Henry Shattuck, Mr. Casey and myself and this man Opsahl, who built it.

Q. You all planned it together?

A. That is my recollection.

Q. Mr. Casey superintended it, didn't he—the construction?

A. I am not sure about that, Mr. Cobb.

Q. Remember testifying to that on the former trial?

A. I was testifying to the manner that it was built in, but [143] I don't know what the actual arrangement was, whether Mr. Opsahl had final authority or Mr. Casey.

Q. Before the work was begun you had determined on its dimensions? A. Yes, sir.

Q. And the method of construction? A. Yes.

Q. You people determined that, didn't you?

A. I am not sure about that.

Q. Well, you had the privilege of determining it, didn't you? A. Yes.

Q. Well, don't you know that you did?

A. We probably did, but, as I say, I don't recall the actual conference on that point.

Q. Then after you got it planned, you got Mr. Opsahl to bid on it, or did you hire him by the day?

A. I think we hired him by the day.

Q. By the day? A. Yes.

Q. He was simply an employee, superintending other employees, then, was he?

A. I'm not sure about that.

Q. Mr. Shattuck, I hand you a photograph that



(Testimony of Allen Shattuck.)

is marked Plaintiff's Exhibit "D," taken in March, 1919, that's been introduced in evidence here, and ask you if you can tell what that represents?

A. That shows the town of Juneau and Gastineau Channel.

Q. How is that?

A. That shows the town of Juneau and Gastineau Channel, including the Casey-Shattuck Addition before the flood. [144]

Q. Now, will you step down here a moment. Shows it before the flood? A. Yes.

Q. Will you point out to the jury Mr. Eikland's house and the Ingman house that was carried out.

(Witness does so.)

Q. Where is the Ingman house?

A. It is farther upstream.

Q. Locate it, if you can. That is the Eikland house that you have pointed out? A. Yes.

The COURT.—Better mark it with a pencil.

Q. Now, then, is your flume shown on there?

A. Bulkhead channel; yes.

Q. Now, that picture was taken from some point on which side of Gold Creek, westerly or easterly? The town is over to your left.

A. I believe it was taken on the westerly side.

Q. Westerly side, looking down towards the channel, approximately in line with the course of the flume? A. Yes.

Q. Now, does that picture show the old original channel that is shown on the two maps to which you have testified? A. Yes.

(Testimony of Allen Shattuck.)

Q. Just point that out to the jury.

(Witness does so.)

Q. Now, the space that you have testified to as being filled with debris that was brought down by the water, is between the point where the old channel would naturally fall into the bay and the mouth of your channel?   A. Yes. [145]

Q. Can you point out any old channel there, or low ground, between your bulkhead and Mr. Eikland's house?

A. Yes; this is low ground here (indicating).

Q. That little place right there?

A. No; the white ground to the left of the channel; left of the cribbed channel, looking downstream, is an old channel that flowed in behind Mr. Eikland's house.

Q. Flowed in behind Mr. Eikland's house?

A. Yes.

Q. Do you mean to the left, as you face that picture?   A. No; to the right.

Q. To the right of it?   A. Yes.

Q. Did it flow between Mr. Eikland's house and that little house shown at that point (indicating)?

A. No; it did not.

Q. Came back into the channel?   A. Yes.

Q. And you built your bulkhead to cut off that little place?   A. Yes.

Q. Left a little half-moon of low ground.

A. To the left of the channel?

Q. Yes.   A. Yes.

Mr. COBB.—I'll offer this in evidence.

(Testimony of Allen Shattuck.)

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "G.")

Q. I refer you now, Mr. Shattuck— Just step down here a moment. The jury couldn't understand your testimony up there. What exhibit is this?

Mr. FAULKNER.—Plaintiff's Exhibit No. 1.  
[146]

Q. Here is the one I want to ask you about— Exhibit No. 5. That is the one you have testified to that showed all that was left of Mr. Eikland's house.

A. All that was left of Mr. Eikland's lot.

Q. And this piece of timber shown, extending to the left from that little piece of picket fence, that is about five feet, is it; that picket fence is about five feet long? A. I suppose so.

Q. That's on the extreme corner of his lot?

A. Yes.

Q. And that (indicating) represents the sidewalk that is left extending out over the washed-out channel? A. Yes.

Q. Now, I refer you to Plaintiff's Exhibit No. 1, being a photograph of the Casey-Shattuck Addition shortly after the flood and overlooking Gastineau Channel. Can you see the Ninth Street bridge across where your flume was, on there?

A. Ninth Street bridge is right in the vicinity of these two houses (indicating).

Q. There wasn't any bridge across what is shown

(Testimony of Allen Shattuck.)

there as the creek channel prior to the flood, was there?     A. No response.

Q. On the approach to Ninth Street, to the bridge, there was a good street across there, at that time, wasn't there?

A. A street was built up there; yes.

Q. And at the time this was taken, water was running down the channel to the left of the bridge?

A. Water ran right behind Mr. Eikland's house.

Q. This picture shows that hospital building?

A. Yes. [147]

Q. Now, the water that you spoke about that was down under the hospital building, was largely coming down through here, wasn't it (indicating)?

A. No.

Q. Where was it coming from?

A. Coming through the course of the cribbed channel and after it got to Ninth Street, it left the course of the cribbed channel and took a course off directly toward the hospital.

Q. And the cribbed channel was blocked to the flow of water toward the sea?

A. It filled up and flowed in another direction.

Q. You remember there being a ball ground out there on the westerly side of the creek on the flats years ago?     A. Yes; yes, sir.

Q. There was a foot bridge to get across Gold Creek, wasn't there?

A. There was two foot bridges across Gold Creek.

Q. There was two?     A. Yes, sir.



(Testimony of Allen Shattuck.)

Q. Can you point out on this map where one of them was?

A. There was one of them right opposite the Alaska Light & Power Company.

Q. One down there (indicating)? A. Yes, sir.

Q. Where was the other one?

A. There was another one across what is marked as the original channel.

Q. That was a good long one?

A. They were both pretty good long ones.

Redirect Examination.

(By Mr. FAULKNER.) [148]

Q. Mr. Shattuck, on Defendant's Exhibit No. 2, there is shown a platform. Did you note *the* over that platform at the time of the flood?

A. No, I think not.

Q. Now, Mr. Cobb asked you about the cribbed channel opposite Mr. Eikland's lot, which would bring it into block 213. Do you know the nature of the ground along in where the cribbed channel crosses block 213, as to whether it was higher or lower than the other portion?

A. The ground behind that part of the cribbed channel is high, mostly.

Q. High ground there mostly.

Mr. COBB.—I didn't understand that question.

Mr. FAULKNER.—He said the ground behind it was high.

Mr. COBB.—The ground behind the cribbed channel?

Mr. FAULKNER.—Yes.

(Testimony of Allen Shattuck.)

Q. Now, how did the ground across the portion of the cribbed channel in block 213 compare with the height of the cribbing itself?

A. All the ground back of the cribbing that is shown on the west side of the cribbed channel, you mean?

Q. Yes.

A. The ground back of that is almost as high as the back of the cribbing for most of its length. On the opposite side, it's not as high.

Q. On that side (indicating)? A. Yes.

Q. On the other side it was high? A. Yes.

Q. As high as the top of the cribbing? [149]

A. Yes.

Q. Now, Mr. Shattuck, at the time that you built the cribbed channel there or the bulkheads, who owned the property?

Mr. COBB.—That is admitted on the pleadings.

Mr. FAULKNER.—No; it isn't.

Q. Who owned the property? Beg your pardon, Mr. Cobb, I don't think so.

Mr. COBB.—All right.

Q. Who owned the property in the tract?

A. Mr. Casey, Henry Shattuck and I owned the greater part of it.

Q. You mean by the greater part of it, the most of it? A. Yes.

Q. Now, had some of it been sold at that time?

A. Yes.

Q. On what conditions?

(Testimony of Allen Shattuck.)

Mr. COBB.—We object to that as irrelevant and immaterial what conditions it was sold on.

Mr. FAULKNER.—If the Court please, I'll state that the purpose of it is to show how the bulkhead was constructed. The question as to the construction of the bulkhead, as to how they constructed it, what care they had used and so on would depend on what their risk was, whether they had anything at stake there. I think for that purpose it is very material.

The COURT.—In this case?

Mr. FAULKNER.—Yes.

Mr. COBB.—They state that they owned the bulkhead that ran through that property. They sold some of it to somebody else. Now, what conditions they sold it on to somebody else is immaterial. [150]

The COURT.—Yes, I think it is immaterial.

Mr. FAULKNER.—I want to show that they still had an interest in it.

Mr. COBB.—You had a lot of interest in it.

The COURT.—Objection sustained.

Mr. FAULKNER.—We'll ask an exception.

Q. Now, Mr. Shattuck, you say you still owned the most of it, then? A. Yes.

Q. Now, on the portion of the plat, Plaintiff's Exhibit "A," which is marked "original channel," was there any of that ever sold—any of this tract in the original channel?

A. There was none of it sold up to the time of the flood.

(Testimony of Allen Shattuck.)

Q. Was there any of it ever sold?

A. Not until recently.

Q. I will ask you this question: Was any structure ever built in there?

Mr. COBB.—Prior to the flood?

Mr. FAULKNER.—No; any time.

Mr. COBB.—No; we object to “any time.”

Q. Well, all right; prior to the flood.

The COURT.—Objection sustained as to any time.

A. No. You mean in the bed or part of the ground that is shown as the original channel?

Q. Within the original channel; within the limits shown as the original channel?

A. No; not out to Willoughby Avenue.

Mr. FAULKNER.—I think that’s all.

Recross-examination.

(By Mr. COBB.) [151]

Q. Mr. Shattuck, I don’t know whether I understood you or not. Did you tell the jury that beyond, on the westerly side—

Mr. FAULKNER.—Pardon me, Mr. Cobb. Mr. Casey has suggested just another question. I’ll be through in a moment.

Q. (By Mr. FAULKNER.) Do you know whether Mr. Henry Shattuck owned; personally owned any property down on the bank, or in the vicinity, of the cribbed channel, in block 213?

A. Yes; he owned a house and lot there.

Q. Which lot is that?

A. I believe it is lot 7, block 213.



(Testimony of Allen Shattuck.)

Q. Was that at the time the cribbed channel was built?     A. Yes.

Q. A house and lot?     A. Yes.

(By Mr. COBB.)

Q. Now, referring to the map made by Mr. Stewart in this case— I don't know the number of it— did I understand you to state that where the cribbed channel there crossed block 204 and block 208, that the west side, the banks on the west side are higher than they are on the east?

A. 204, did you say?

Q. Across 204 and 208—that the banks along there are higher than they are—

A. (Interrupting.) The cribbed channel, as shown on Plaintiff's Exhibit "A" here, on the westerly side, is still intact. It wasn't taken out by the flood. The ground immediately behind it, the greater part of that was practically as high as the top of the cribbed channel.

Q. Yes. Well, I understood you to say—I must be mistaken—that from that point on the map, showing the northerly end of the cribbed channel still intact, from there on up, the [152] west banks were higher than the east banks.

A. No; I didn't testify to that.

Q. The east banks were considerably higher, were they not?

A. There isn't much difference in the elevation of the ground back there, on the east and the west side.

Q. Isn't the east side higher?

(Testimony of Allen Shattuck.)

A. It might be a few feet higher on the east side, on 204 than it is in 208.

Q. Higher than 209?

A. No; the slope of the creek was quite heavy.

Q. I'm not talking about the slope of the creek. I'm talking about the ground on the east side of the bank.

A. All right. The slope of the ground from the west side of the corner of 204 to a point opposite plaintiff's lot sloped quite materially. There is no part of the Addition that slopes any more rapidly than the ground in there.

Q. That isn't the question. I'm asking you whether the east side, on the east side the banks along where Mr. Eikland's house was, isn't considerably higher than the westerly side, opposite the creek bank? A. No.

Q. All right. You may let it stand at that. Do you recall that picture?

The COURT.—Well, now, never mind arguing it.

### **Testimony of Charles Goldstein, for Defendants.**

CHARLES GOLDSTEIN, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Please state your name? [153]

A. Charles Goldstein.

(Testimony of Charles Goldstein.)

Q. Where do you live?     A. Juneau.

Q. How long have you lived in Juneau?

A. Off and on for about thirty-seven years.

Q. Were you in Juneau on the 26th of September, 1918?     A. I was.

Q. Were you here when this case was tried in March, 1919?     A. I don't think I was.

Q. Where were you on the 26th of September, 1918, at the time of the flood?

A. I was out at the flood.

Q. In the Casey-Shattuck Addition?

A. Yes, sir.

Q. You observed conditions out there that day?

A. Yes; to a certain extent.

Q. Now, did you observe the rainfall that day?

A. Yes.

Q. From your observations, had you ever experienced a greater rainfall in Juneau than there was that day?     A. I don't think so.

Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. I couldn't say that either.

Q. Did you observe the flood waters in the creek that day?     A. I did.

Q. Did you ever see anything as high as that before? [154]     A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. You never had seen any flood there, particu-

(Testimony of Charles Goldstein.)

larly high flood, since the construction of this flume, had you?     A. I can't say that I did.

Q. How's that?     A. I can't say that I did.

Q. You don't think you did?     A. No, sir.

Q. You simply say that when you went out and saw the conditions, when you got there, water was being confined, to a certain extent, by the flume, wasn't it?

A. Well, I couldn't say it was confined. It was covered up and the water was running clear over the whole flats.

Q. What time of the day was that, Mr. Goldstein?

A. Well, I was there for four or five hours.

Q. What time did you go out?

A. To the best of my recollection, it was about noon time.

Q. About noon time?     A. Yes, sir.

Q. Water was then going over the flume and through it?

A. Well, I couldn't say anything about the flume, because I didn't get up that far.

Q. You didn't get up that far?     A. No, sir.

Q. You were down at the lower end?

A. I was down where Eikland's house is.

Q. Uh—huh.

A. Not Eikland's, but, what's his name? The carpenter who [155] had a little house there—worked for the Alaska-Juneau.

The COURT.—Ingman?



(Testimony of Charles Goldstein.)

A. Yes; the Ingman house.

Q. You know when that went out?

A. It didn't go out. My recollection of it is that the Ingman house stood right on the bank. We were out there helping a lot of people to move that were moving.

Q. Were you there when Eikland's house went out?

A. I couldn't say whether it was Eikland's house or not. I saw a house coming down the stream.

Q. You are an old-timer here and have observed rainfalls, and so on. I'll ask you if it isn't a fact that you hunt a great deal out in the mountains, or not? A. Yes.

Q. Pretty familiar with weather conditions consequently? A. Yes, sir.

Q. Isn't it a fact that in regard to high waters in the streams there are two elements enter into it, or may enter into it. One is the amount of rainfall and the other is the amount of fresh snow that may be melted by the rain?

A. Certainly; could do it, alright enough.

Q. Sometimes a lesser rainfall might produce greater floods in the streams, if it should happen that up at the head of the streams in the mountains, is some fresh snow?

A. Well, it takes a pretty good fall of rain to raise a creek to the height that one was.

Q. What I am asking you, Mr. Goldstein, is whether you haven't observed that wherever there is fresh snow in the mountains in the fall of the

(Testimony of Charles Goldstein.)

year and a warm rain comes with it, the floods or streams are considerably higher than they would be [156] from rains alone?

A. Naturally would.

Q. And you have observed that as an actual fact, haven't you?     A. Yes.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Did you observe the damage that was done in Juneau generally that day?

Mr. COBB.—That's not proper redirect examination.

Mr. FAULKNER.—Well, I'll ask permission to ask it.

Mr. COBB.—Well, that's all right.

Q. Did you observe the other damage that was done in Juneau that day?     A. Yes, sir.

Q. Where was that?

A. Back of the Gastineau Hotel, for instance, was one of them.

Q. What happened there?

A. A slide came down there and demolished those houses and ran down that—

Q. (Interrupting.) How many houses?

A. I think there was two or three.

Q. Do you know how old those houses were, how long they had been there?

A. One of those houses was there quite a long while. Williamson's house was there, I should judge twelve or fifteen years or more.

(Testimony of Charles Goldstein.)

Q. Now, Mr. Cobb asked you if you observed the flume and you said you didn't go up far enough to observe the flume. Now, which flume did you mean? A. I mean the flume at the bridge.

Q. Which bridge? [157]

A. Gold Creek bridge.

Q. You didn't refer to the cribbed channel or bulkhead?

A. No, sir; I didn't say that at all.

Q. Water was over that? A. In places it was.

Recross-examination.

(By Mr. COBB.)

Q. Mr. Goldstein, every few years since you have been here, ever since there have been any buildings on what we call "Swede Hill," there has been more or less slides and damage?

A. There has been some.

Q. That's not uncommon at all. A. No.

Q. Nor slides along the roads leading up to the mountains? A. No, sir.

Q. Now, which houses—do you refer to the houses that went down over which lawsuits were tried against the Alaska-Juneau Company?

A. No, sir.

Q. That wasn't the time?

A. That was later on.

Q. That's what I thought.

**Testimony of W. Layton, for Defendants.**

W. LAYTON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Layton, will you state your name?

A. W. Layton.

Q. Where do you live, Mr. Layton? [158]

A. Juneau.

Q. How long have you lived here?

A. Since 1889.

Q. In what part of town do you live?

A. Lower Front Street.

Q. Were you here on September 26, 1918?

A. Yes.

Q. Where were you on that day, Mr. Layton?

A. Well, up to about eleven o'clock I stayed down there.

Q. Down home?

A. Down home there, fixing the flumes there, and about eleven I think; between eleven and twelve, I went over to the flats.

Q. What did you observe out there when you went out there?

A. Well, the overflow of the creek.

Q. Where did you go—to what point?

A. Went out on Willoughby Avenue and from there up to the laundry, the Northern laundry.



(Testimony of W. Layton.)

Q. Across Gold Creek bridge?

A. Yes, I crossed Gold Creek bridge.

Q. About what time did you cross there?

A. I should judge it was pretty close to twelve o'clock.

Q. Did you see how high the water was there at the bridge? A. Yes.

Q. At that time? A. Yes.

Q. How high was it?

A. Well, it was pretty well up. Exactly the height, I couldn't tell you.

Q. How close was it to the bridge then—pretty close?

A. It was pretty well up, but exactly how high I couldn't tell you. [159]

Q. Did you come back across the creek again?

A. Yes.

Q. What happened to that bridge that day?

A. The bridge got washed out.

Q. Where did you go; what did you do after that?

A. Came back in; went back home again.

Q. Did you go down to the native hospital?

A. No.

Q. Did you go down by Mr. Eikland's house?

A. No closer than the Northern Laundry. I could look across where they were.

Q. What happened to the laundry building?

A. Water was terribly high, rolling boulders in the creek, and so on.

(Testimony of W. Layton.)

Q. Did you observe anything come down the creek?

A. Yes; there was lots of timber, stumps, and so on.

Q. Was some of the water coming over the bank?

A. It struck pretty hard there at the turn.

Q. What did it do to the bank?

A. Washed away the bank there considerable. At that time it was up about level with the bank.

Q. Rushing over by the houses there, surrounding any of the houses?

A. Not right at the laundry, I didn't notice that. It struck that bank there and kind of turned and went in another direction.

Q. Now, Mr. Layton, did you observe any damage that was done by that flood out there that day?

A. Yes; there were two or three buildings washed away, between there and the bridge. [160]

Q. Were you out there the day after the flood?

A. No.

Q. Did you observe any damage done anywhere else in town that day?     A. At the Gastineau.

Q. What was done there?

A. Two or three buildings there laying above the Gastineau upside down.

Q. Fell down?     A. Yes.

Q. Did you see any stream of water coming down in that vicinity?

A. Yes; we were there cleaning up in the Gastineau.

Q. Water came through into the hotel?

(Testimony of W. Layton.)

A. Yes, and out into the street.

Q. Did you observe any damage, any high water at any other point further down? A. Yes.

Q. What was there?

A. Mud right across the street, about.

Q. Down about in the vicinity of your house?

A. Well, right where I am living; yes. The flumes there was all overflowed.

Q. And further down, where the Alaska-Juneau property is, did you observe anything there?

A. Yes; there was a slide there.

Q. Did you observe the rainfall that day, Mr. Layton? A. Yes.

Q. Now, in your experience, in the time that you have lived in Juneau, have you ever observed a greater rainfall than there was on that day? [161]

A. No, sir.

Q. Did you ever see such high water in Gold Creek as there was on that day? A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. Have you seen all the high waters that have been in Gold Creek since you have been up here?

A. No; I never took much notice of Gold Creek myself.

Q. You don't think you ever saw it rain quite so hard? A. No.

Q. Since you have been up here? A. No.

Q. It is no uncommon thing, since they have been building on the side of the mountain called Swede

(Testimony of W. Layton.)

Hill, steep mountainside, for some of the houses to slide at times? A. Yes.

Q. They do it here every year.

A. No; not exactly every year.

Q. But every time there is a heavy rain?

A. Once in a while when there is a heavy rain.

Q. Yes, once in a while. Been doing that for years? A. Doing it for quite a while back.

Q. For the purpose of the record, I guess the jury all know that what is referred to here in the testimony as Swede Hill, where these houses are said to have slid down that day, is a very steep hill—almost as steep as it is possible to build on, isn't it?

A. It is.

#### Redirect Examination.

(By Mr. FAULKNER.) [162]

Q. You say you have seen slides before. Did you ever see as many slides *slides* or as much water come down the hills as there was that day?

A. No, sir.

#### Testimony of Susie Michaelson, for Defendants.

SUSIE MICHAELSON, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified through an interpreter, who was duly sworn to correctly interpret the Indian into the English language, as follows:



(Testimony of Susie Michaelson.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name?

A. Mrs. Michaleson.

Q. Mrs. Michaleson, where do you live?

A. In Juneau; down below the courthouse here.

Q. How long have you lived in Juneau?

A. A long time.

Q. How old are you?      A. Fifty years old.

Q. Where were you born?      A. Here in Juneau.

Q. Whereabouts?

A. I was born down in the locality where Charley Goldstein's building is. We had a house there and a garden there.

Q. You know where Gold Creek is?      A. Yes.

Q. Did you ever live out in that vicinity out there?

A. Yes, we used to have a smokehouse there, a fish house.

Q. Where was that fish house?

A. Where the native hospital is.

Q. Now, how old were you when you had the smokehouse there? How long ago was that? [163]

A. It was about as long as I can remember.

Q. Do you know where Gold Creek was when you had the smokehouse there, where the creek went.

Mr. COBB.—I think I shall object to that testimony as irrelevant and immaterial. It doesn't make any difference where Gold Creek went, according to this witness' testimony. She is fifty

(Testimony of Susie Michaelson.)

years old and they had that smokehouse there as far back as she can remember. It must have been forty years ago. I don't see how it can throw any light upon this.

The COURT.—Simply preliminary?

Mr. FAULKNER.—The purpose is to show the tendency of the creek to—

The COURT.—Yes, I understand. Objection overruled.

(Question repeated by reporter.)

A. The creek ran into a kind of fork. Our smokehouse was in between. The creek that ran on the other side was smaller than the creek that ran on this side. The creek that ran on this side of our smokehouse was the main creek that we caught our salmon in.

Q. That is, this side nearest to Juneau?

A. That was the largest creek.

Q. Now, were you in Juneau on September 26, 1918, when we had the flood in Gold Creek?

A. Yes.

Q. Where were you on that day?

A. I was at my home.

Q. Did you go anywhere? Did you go anywhere from your home?

A. I made two attempts to go down there on the flat and I got frightened back. I wanted to try to go down to where my boy's home is. [164]

Q. Where is your boy's home?

A. Down on the flats.

Q. What frightened her back?

(Testimony of Susie Michaelson.)

A. Water was rising and it was too high. I was afraid to take any chances.

Q. Could you get over to his home? A. No.

Q. What kept her from getting there?

Q. Water raised too high.

Q. Do you know where that home was, what street it was on? The question is whether she knows or not—the name of the street.

A. I don't know the name of the street.

Q. Now, Mrs. Michaelson, did you ever see as much water in Gold Creek before as there was that day? A. No.

Q. Did you ever see as much rain as there was that day? A. No.

Cross-examination.

(By Mr. COBB.)

Q. Did you go out to Gold Creek that day?

A. I went out there twice.

Q. Whereabouts on Gold Creek?

A. On this side, down at the mouth.

Q. Down on Willoughby Avenue?

A. Yes; on this side.

Q. Couldn't you cross the creek on Willoughby Avenue? A. No.

Q. What was the reason you couldn't cross Gold Creek on Willoughby Avenue? [165]

A. Water was too high.

Q. Was the water of Gold Creek running over Willoughby Avenue? A. I didn't get you.

(Testimony of Susie Michaelson.)

Q. Was the water of Gold Creek flowing over Willoughby Avenue?

A. Down on the lower part, on the flats, water was running right over the street, right over the ground, over the sidewalks.

Q. Ask her if it was running over Willoughby Avenue. She said she couldn't cross on Willoughby Avenue. Ask her if the water from Gold Creek was running over Willoughby Avenue.

A. I don't understand you.

Mr. FAULKNER.—I suggest that Mr. Cobb confine it to a certain point. She has testified at what point it was. If you will ask her what point she means—

Mr. COBB.—Any point.

The COURT.—Ask her what she means by Willoughby Avenue. I think she is entitled to know that?

Q. You know Willoughby Avenue?      A. No.

Q. Doesn't know Willoughby Avenue. She says she doesn't know Willoughby Avenue?

A. She said "No."

Q. How did you try to get across Gold Creek, whereabouts did you try to get across Gold Creek to get to that house?

A. Where there is a bridge going across.

Q. How is that?

A. On the lower side where the bridge crosses. I came to this side where the crowd was.

Q. Power-house was.

Mr. WICKERSHAM.—Where the crowd was.



(Testimony of Susie Michaelson.)

Q. Oh, where the crowd was? [166]

A. Yes.

Q. Was that down next to the salt water?

A. You know the place where the bridge crosses, down on the continuation of Willoughby Avenue? She didn't say Willoughby Avenue, but that is what she means.

Q. Was that where she tried to cross?

A. Yes.

Q. You tried twice to get across there and you couldn't on account of the high water?

A. I went down there the first time with my shoes and got my feet wet and I returned home and put on my gum boots and I tried again.

Q. Is that the place where the bridge has been built in the last year or two—the last two or three years?

The COURT.—Just ask her that. Is that the place where the bridge has been built?

INTERPRETER.—That is what I am trying to ask her, Judge.

A. I don't understand what you mean. There's several bridges crossing there. They were all flooded along down there on the flats.

The COURT.—Let me ask her a question or two. Ask her if she knows where the Home Grocery is?

A. Yes.

The COURT.—When she went to see her son that day, did she go by the Home Grocery?

A. It was at that point that I turned back.

Q. Ask her if she has seen Gold Creek at all times

(Testimony of Susie Michaelson.)

that it happened to be high water since she has been here?   A. Yes.

Q. Every time there has been flood waters, she has gone out to [167] Gold Creek to look at it?

A. Well, I was raised on the banks of the creek. We got our water from there and I observed it all the time I lived there.

Q. She has been in Juneau constantly since she was born here? Ever been away?

A. I never went away from this part at no time.

Q. Never left Juneau at all. Never been to Sitka?   A. No.

Q. Never been to Haines?   A. No.

Q. Never been down to Sheep Creek?

A. Never saw Haines.

Q. How?   A. Never saw Haines.

Q. Never been down to Sheep Creek?

A. Oh, yes; that is, went down there is a rowboat.

Q. Ever been up to Auk Bay?

A. We would go up there in the summer-time; after berries or whatever we wanted.

Q. How many times have you seen high water in Gold Creek?

A. I have noticed Gold Creek raise, but I have never seen—I never saw the water raise so high any other time.

Q. Now ask her if she can remember how many times she saw high water.

A. I couldn't—I never kept track of how many times. It never entered my mind.

Q. Ask her if she has ever seen water there go

(Testimony of Susie Michaelson.)

all over the flats. Ask her if before this September, 1918 flood, she ever saw water all over those flats out there? [168] A. No.

Q. Never saw water all over, at all? A. No.

Q. It was always running in the channel. Ask her if she always saw the water running in the channel? A. Yes; just in the main channel.

Q. In the main channel. Never saw the waters so high that they spread out away from the main channel, or an overflow?

A. Yes, I have seen it go over the banks of the creek, run over the banks of the creek, but I never seen it flow as it did that time that you are talking about, 1918.

### **Testimony of Mary Johnson, for Defendants.**

MARY JOHNSON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified through an interpreter sworn to interpret Indian into English, as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. What is your name? A. In Indian?

Q. No; in English. A. Mary.

Q. Mary what? A. Johnson.

Q. How old are you, Mrs. Johnson?

A. Sixty years old.

Q. Where do you live? A. Here.

(Testimony of Mary Johnson.)

Q. In Juneau? A. Yes, in Juneau.

Q. How long have you lived in Juneau? [169]

A. I was born here; here in Juneau.

Q. Do you know where Gold Creek was?

A. Yes.

Q. Did you ever live near Gold Creek?

A. No.

Q. Did you ever live out here on the flats?

A. Yes.

Q. Where did you live when you were a little girl? A. Here in Juneau.

Q. Whereabouts?

A. I used to stay here in the smokehouse, curing salmon, when I was a little girl here.

Q. Where was the smokehouse?

A. About where the native hospital is.

Q. Who owned that smokehouse?

A. It belonged to our family.

Q. Now, did you see the creek out there by the smokehouse? A. Yes.

Q. Which way did the creek go by the smokehouse?

A. On like an island where our smokehouse was. The creek branched above, up above, a ways above our house and ran the other way and it also ran this way, and the main stream was on this side of our smokehouse and we secured our salmon out of the main stream.

Q. Now, Mrs. Johnson, were you in Juneau at the time of the big flood in September, 1918?

A. No.



(Testimony of Mary Johnson.)

Q. Where were you on that day?

A. I was up at the bar that day.

Mr. FAULKNER.—That's all. [170]

Mr. FAULKNER.—If the Court please, I offer in evidence a certified copy of the weather records from the Department of Agriculture, which are certified to by the Department of Agriculture, showing the rain in Juneau from July, 1909—highest periods of rain, from July 1909, to September 26, 1918.

Mr. COBB.—Well, I don't—

Mr. FAULKNER.—I think under a section—whatever it is—it is admissible, of the Revised Statutes.

Mr. COBB.—No; that wasn't the point at all. I think the period is entirely too short to be of any value. It only covers a period of nine years.

The COURT.—Well, it may be received for what it is worth.

(Whereupon said document was received in evidence and marked Defendant's Exhibit No. —.)

Mr. FAULKNER.—I'll read this to the jury.

Mr. COBB.—They probably couldn't remember it. You can read it in the argument.

Mr. FAULKNER.—This is a certified copy of the weather records made by the Department of Agriculture at Washington, D. C., showing the greatest precipitation in twenty-four hour periods for the years 1909 to 1918, twenty to twenty-four hour period. In 1909, on July 27th, the highest period was 1.42; in 1910, the highest period in

(Testimony of W. W. Casey.)

twenty-four hours, was .95; in 1911 the highest period was on December 2, 1.72; in 1912, on February 22, 3.50; in 1913, October, 3.50; in 1914, on February 14, 2.40; 1915 was on September 28, 1.82; in 1916, it was on July 29, 1.78; in 1917, it was Sept. 17, 2.12; in 1918, September 25th and 6th, 5.54. [171]

**Testimony of W. W. Casey, for Defendants.**

W. W. CASEY, one of the defendants herein, called as a witness on their behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. You are one of the defendants in this action?

A. Yes, sir.

Q. And you own an interest in the tract mentioned that is in controversy here?      A. Yes, sir.

Q. What interest do you own?      A. One-half.

Q. There is one thing I want to call your attention to that is a little bit out of order. I'll hand you Plaintiff's Exhibit "G," and ask you to look at the cribbed channel shown on that photograph, and I call your attention to this area over here (indicating). What is that that I have pointed to?

The COURT.—On the right-hand side?

Mr. FAULKNER.—On the right-hand side of the cribbed channel.

(Testimony of W. W. Casey.)

The COURT.—On the right-hand side of the picture.

Mr. FAULKNER.—Yes; on the right-hand side of the picture.

A. That's a place where water once ran.

Q. Well, at the time the cribbed channel was built, was there any water running there?

A. No, sir.

The COURT.—You'll have to speak louder.

The WITNESS.—No, sir.

Q. That there was an old creek-bed?

A. An old creek-bed.

Q. Now, Mr. Casey, how long have you been interested in this [172] tract of land?

A. Since 1913.

Q. Where do you live? Where do you live now?

A. Beg pardon?

Q. Where do you live now?

A. Down on Tenth Street, in block 214.

Q. On the tract of land in question?

A. Yes, sir.

Q. How long have you lived there?

A. About five years, I think.

Q. Are you familiar with this tract of land?

A. Yes, sir.

Q. How long have you been familiar with it?

A. Well, practically since I bought an interest in it.

Q. Ever since you bought it? A. Yes.

Q. You were familiar with the course the water took in coming out of Gold Creek canyon?

(Testimony of W. W. Casey.)

A. Yes, sir.

Q. During those years? A. Yes, sir.

Q. How long have you lived in Juneau?

A. Since the spring of 1898.

Q. What did you use this land for, prior to 1912?

A. Pasture land.

Q. Pasture lands? A. Yes.

Q. You yourself used it? A. Yes, sir.

Q. Have you been over it during that period?

[173]

A. Yes, sir.

Q. Now, in 1912, what did you do with it with reference to a survey? A. We had it surveyed.

Q. Who made the survey?

A. Mr. Hill and Mr. Wettrick and others.

Q. Now, at that time, or up to the time of that survey, where did Gold Creek flow? Show that on Plaintiff's Exhibit "A." Show to the jury where the creek flowed up to the time of the official survey. Take this (handing exhibit to witness) so they can all see. This is Gold Creek bridge.

A. The creek came out of the canyon here and flowed down here, to some point in between the point of Ninth and Tenth Streets. There was a division of the creek there. Part of it went that way and the rest of it came this way (showing).

Q. Where did the main body go?

A. Some years pretty nearly all of it went on the east side.

Q. On the east side?



(Testimony of W. W. Casey.)

A. And some years, 1911, 1912, a good deal of it went on the west side.

Q. What happened to the westerly part of it, or what is marked as the original channel, in 1913?

A. We had a wing dam in at some place between Ninth and Tenth for the protection of the Pacific Coast dock.

Q. Where was the Pacific Coast dock?

A. Down here (pointing).

Q. Which direction from the plat?

A. Down here (indicating).

Q. At the foot of this street (indicating Main Street). [174]

A. And the ships had a good deal of trouble. They would go aground at low tide, and we put in a wing dam to make it go the other way. Now, in this particular year, we had quite a little freshet and the ground, and so forth, came down there as it did from the basin and struck the wing dam and went into that pool and nearly filled it.

Q. What was being done up in the basin at that time? A. A lot of placer mining, quartz mining.

Q. Was there any particular activity up there?

A. The Perseverance was doing a good deal of work and the Alaska-Juneau was running.

Q. Where is the lowest part of the tract?

A. Right here (indicating).

Q. Which corner would that be?

A. This would be the southeastern corner.

Q. Southeast corner? A. At that time.

Q. Yes. Now, there is marked on this way, Plaintiff's Exhibit "A," a section marked "the old

(Testimony of W. W. Casey.)

channel." Will you describe what is in that at the present time.

A. Well, water may have run there at some time, but not to my recollection, to amount to anything. There is grass, quite good-sized trees. This is all grass in here (pointing), with trees over it, and this in here (pointing); houses over here.

Q. Is there any creek there at all at what is marked on this, what might appear to be the intersection of an old channel with what they marked "the original channel"? A. No.

Q. It's solid ground? [175] A. Yes, sir.

Q. Anything growing on it?

A. Trees and grass.

Q. Now, is there anything growing up here, in what is marked the original channel?

A. Small trees.

Q. What kind of trees?

A. Willows, I think; small trees.

Q. At the time you built the wing dam, you say that was for the purpose of deflecting the water over to the westward? A. To the westward.

Q. To keep it away from the easterly bank?

A. To keep it away from the electric light company and the Pacific Coast dock. We were paid for the work.

Q. Did you at any time during those years, do any work anywhere else in that vicinity or in that section with a cribbed channel?

A. We did quite a little work just back of the electric light company and below that.

(Testimony of W. W. Casey.)

Q. Where would the electric light company's plant be on that plat?

A. Supposed to be in here some place (indicating).

Q. Yes.

A. We put in a lot of brush there and allowed the water to run over it and accumulate the sediment that came down from the mines.

Q. Who paid for that work?

A. The electric light company.

Q. Now, who else had property down there, if you know? Any other man have property in that vicinity whose property was [176] affected?

A. Oh, Donaher; yes.

Q. Mike Donaher? A. Mike Donaher; yes.

Q. Now, do you recall who did any of that work at that time?

A. Gus Anderson did the brush work. I am not sure who did the other work. I know he had some one working there, but I don't recall.

Q. Where is Gus Anderson now?

A. He is living here.

Q. In Juneau. Now, Mr. Casey, after you had this platted, what did you do with it?

A. In 1913?

Q. Yes. A. Put it on the market.

Q. Did you sell some of it?

A. Had it for sale.

Q. Now, you say you platted it and put it on the market? A. Yes, sir.

Q. Now, did you sell some of it? A. Yes, sir.

(Testimony of W. W. Casey.)

Q. Now, in 1914, what, if anything, did you do out there?     A. Built a flume.

Q. Was it a flume, or was it— Was there a flume there?

A. Cribbed the creek, put cribbing on each side—

Q. As a matter of fact, there wasn't any flume there at all?

A. No; there was a cribbing on each side.

Q. Now, you say you built that in 1914?

A. Yes; the winter of 1914.

Q. Now, I forgot to ask Mr. Shattuck—when was Willoughby Avenue [177] constructed, before that or afterward?

A. The following summer.

Q. Now, you built the cribbed channel. Where did you build that?

A. We commenced at the lower end of the tract, or near, on Seventh Street; about probably fifty feet this side of the hospital, at the bottom, at the lower end of the creek, and built up on each side of the creek.

Q. Where was the creek flowing at that time?

A. Right in the middle— We built at the lower place, where the creek was, straight up from the bottom.

Q. You built that along the banks where the creek was?

A. Commencing at the bottom, at the lower end—the seaward side.

Q. Did you bring in some material there to build the bulkhead?     A. Brought it all in.



(Testimony of W. W. Casey.)

Q. What did you bring in?

A. By water. Logs or piling, ranging from about sixty feet to some as long as 110 feet.

Q. 110 feet. How did you get those in?

A. We floated them in on the tides, a little this side of the hospital, right out to the piling.

Q. Right into the mouth of the creek?

A. Right into the mouth of the creek and hauled them up through the center, through the water, up the creek.

Q. Why did you bring them in there?

A. It was the lowest place you could carry them by water.

Q. Carried them in there by water? A. Yes.

Q. And built the bulkheads up along the banks of the stream? [178] A. Yes, sir.

Q. Now, how far up did you build those? I mean, how far up toward Gold Creek bridge?

A. A distance of about twelve hundred feet.

Q. Twelve hundred feet?

A. Very close to that.

Q. Who did that work?

A. A man by the name of Opsahl, assisted by others who did a good deal of the shoveling.

Q. Did you do some of the work yourself?

A. I was there pretty nearly all the time.

Q. Did you have some men there? A. Yes, sir.

Q. Who was Opsahl?

A. He was an old-time miner, who used to mine in Montana. He and I and a fellow by the name of Peterson, did a little mining up in the Porcupine

(Testimony of W. W. Casey.)

country the summer before—two or three summers before. We tried to, rather.

Q. Did he do any construction work?

A. Yes; we built a little flume up there to carry a little water down.

Q. Was he experienced in that kind of work?

A. Yes, sir.

Q. Before he came to Alaska, where had he been?

A. Working in mines. He was a placer miner.

Q. Where did he live here in Juneau?

A. Down on the bank, in block number—he lived in block No. 208. He owned those lots right there (pointing).

Q. Where is he now?

A. I don't know. [179]

Q. When did he leave here? About when did he leave here, do you remember?

A. Well, I couldn't say that. It might have been a year; it might have been two years.

Q. Did he go before these suits were brought?

A. Oh, yes; I think he did. I don't remember his being here.

Q. You have never seen him since?

A. He went back to Montana; that is, he said he was going to Montana.

Whereupon Court adjourned until 10 o'clock  
A. M., Nov. 15, 1922.

Wednesday, November 15, 1922, 10 o'clock A. M.  
Court met pursuant to adjournment.

W. W. CASEY (on witness-stand).

(Testimony of W. W. Casey.)

Direct Examination (Resumed).

(By Mr. FAULKNER.)

Q. Mr. Casey, you stated that you built your bulkheads in the winter of 1914? A. Yes, sir.

Q. Now, will you describe to the jury the manner of construction of the bulkheads in question, on the banks of the stream?

A. We dug a trench, or two, as the case would be, down to a depth—it depended on the ground—some ground was a little bit higher than others. In one place we would have to go down three, four or five feet, and in other places, you wouldn't have to go down more than two and a half or three feet. We put in a long log— We shoveled the snow out and dirt and then put in a log and then put in a log on the other side, to make the cribbing. Put it in so that there [180] would be two logs run parallel; then we put in short pieces, put them across and put another log on top, and then took brush and rocks and filled these spaces in put in quite a good deal of brush and filled it with rocks.

Q. How did you fasten the cross-pieces?

A. We drift-bolted them with long drift bolts, sixteen to 18 inches long.

Q. What was the nature of the cross-pieces? What did they consist of?

A. The same as these others. They were piling.

Q. What was the length of the piling on the sides?

A. The piling that we got averaged from sixty to

(Testimony of W. W. Casey.)

110 feet in length. They ran from sixty to 110 feet.

Q. About what size approximately?

A. Probably on the top, the very long piles, were from ten to twelve inches, and the shorter piles would be about the same. We had piles there that were not to be over such a size at the butt and such a size at the top.

Q. You dug those trenches on both sides of the creek?     A. Beg pardon?

Q. You dug those trenches on both sides of the creek?

A. Both sides of the creek; yes, sir.

Q. About how wide was the bulkhead?

A. Average through about five feet.

Q. What was the width, the distance between the two bulkheads between the two banks of the stream?

A. Between thirty, forty feet.

Q. At the lower end, down toward the sea, how was it constructed?

A. At the lower end we drove piles and lined them with three-inch lumber. [181]

Q. You say these bulkheads were built on the banks of the creek?

A. Right on the banks of the creek.

Q. The creek was running in there at the time?

A. Yes, sir.

Q. This has been referred to several times as a flume. I want you to describe that to the jury. Was it a flume or not?



(Testimony of W. W. Casey.)

A. Not a flume; it was just a cribbing on each side of the creek.

Q. And at the lower end of it was the channel narrower or wider than it was at the upper end?

A. Narrower.

Q. Why was that?

A. To keep the bottom clear.

Q. Clear of what? What was down there?

A. The sand, light gravel, light rocks and anything that would come through there. It was deeper and narrower.

Q. Deeper and narrower.

A. At the lower end, probably—at the lower end of my barn, it would probably be about twelve feet deep; that is, it was planked at that time.

Q. You say it was planked on the inside, at the lower end?

A. Yes; piles driven out to the beach, about, probably 200 feet south of where Willoughby Avenue now runs.

Q. Now, you did all that work—I mean the defendants? A. Yes, sir.

Q. And the defendants paid for it?

A. Yes, sir.

Q. Now, at that time, at the time you did that work, had you [182] sold any lots out there, do you remember?

A. Well, a few probably. Eikland had a lot and maybe one or two others. I don't just remember. The records would be the best—

Q. Now, at the lower end, where you say it was

(Testimony of W. W. Casey.)

narrower, toward the sea, how was the current there? Was it stronger? A. Oh, yes.

Q. Swifter than it was at the upper end?

A. Oh, yes.

Q. Now, you heard Mr. Wagner testify yesterday that the logs were laid across from one boulder to another. Was there any place where that was done? A. No, sir.

Mr. COBB.—Testified that what?

Mr. FAULKNER.—That the logs were laid from one rock to another, on the surface.

Q. Now, did you take any measurements at the time of the construction of the bulkhead to determine the capacity of it? Was there anything you could measure out there? A. The flume above.

Q. Where was the flume above?

A. One up at the water works and one was above there, in the basin.

Q. That would be in what basin?

A. Jualpa basin.

Q. Now, what was the capacity of the flume in the basin as compared with the capacity of the channel that you cribbed in? Which was the larger?

A. We were from forty to fifty per cent larger than the flume above. [183]

Q. That carried the waters of the same creek?

A. Yes.

Q. Was there anything you could measure out on the flats—any creek bed or creek channel that you

(Testimony of W. W. Casey.)

could measure, that would give you any information as to the capacity?

A. Nothing confined. It was just scattered and running out there in any direction.

Q. Now, you say the old—what is marked on Plaintiff's Exhibit "A," as the original channel, had by that time been filed up? I think you testified that way yesterday? A. Yes, sir.

Q. And you weren't able to take any measurements of that? A. No; no.

Q. Now, was this bulkhead, these bulkheads on the two sides of the creek constructed in a uniform manner? Was there any difference between them?

A. Not a bit.

Q. Was there any difference in the strength?

A. Not a bit; not knowingly.

Q. Where the bulkhead crossed opposite Mr. Eikland's lot, along, I think that would be in block 213 and across the street there, what was the nature of the bank on the westerly side, before the bulkhead was constructed—the natural bank?

A. It was quite high there.

Q. How high was it in comparison with the height of the cribbing?

A. I think it was a little higher than the cribbing in some places and not quite as high in others.

Q. Little higher in places? [184]

A. Yes.

Q. And it was constructed the same on both sides of the channel? A. Yes, sir.

Q. Now, at the time you built the bulkheads, Mr.

(Testimony of W. W. Casey.)

Casey, did you consult with anyone besides Mr. Opsahl?

A. Mr. Tripp and others that we talked with regarding it—engineers, surveyors.

Q. What did Mr. Trip do, if anything?

A. Went down there and looked it over and talked about it.

Q. Did you follow his advice?

A. Yes, sir; as near as I thought we needed to. We did it as we thought— We both agreed on the bulkhead.

Q. Did you make any changes in your plans there from time to time after talking with Mr. Tripp or anyone else?     A. No, sir.

Q. Now, did you build those bulkheads, having in mind the conditions in the stream and the rainfall and the flood conditions that would naturally occur?

A. Yes, sir.

Q. And did you build it, in your judgment, of sufficient capacity and strength to carry the water?

Mr. COBB.—We object to that as both leading and—

The COURT.—(Interrupting.) Yes.

Mr. COBB.—(Continuing.) And calling for the opinion of the witness. He hasn't shown himself qualified to give an opinion—asking him if something was, in his judgment, sufficient.

The COURT.—Objection sustained.

Q. Well, Mr. Casey, you said you had experience before in [185] *in building*—

A. (Interrupting.) Yes, sir.



(Testimony of W. W. Casey.)

Q. You testified yesterday?      A. Yes, sir.

Q. How long have you been acquainted with that section of the country, out in this tract?

A. Well, I came here in '98, and I have known it to some extent ever since.

Q. How long did you say you owned the tract?

A. Since 1903.

Q. Been familiar with it since then?

A. Yes, sir.

Q. Are you familiar with climatic conditions in this section of the country?      A. I think so.

Q. Have been here continuously?

A. Yes, sir.

Q. Have you observed the rainfall?

A. Yes, sir.

Q. And the height of water in the streams?

A. Yes.

Q. During that period. Now, Mr. Casey, where do you live? Will you point out to the jury on the plat here where your home is and give them the number of the lot and block, so that the jury can see?

A. I live in lot 8, block 214. I didn't know it was marked.

Q. Now, on the morning of the 26th of September, 1918, what time did you get up in the morning—about?

A. I suppose a little after six or about six o'clock.

Q. Where did you go after you left the house?

A. Went to the barn. [186]

Q. Where is the barn?

(Testimony of W. W. Casey.)

A. Down on Willoughby Avenue; south of Willoughby Avenue.

Q. South of Willoughby Avenue. Is it on the tide flats?     A. Yes, sir.

Q. Did you observe the water in the creek at that time?     A. Yes, sir.

Q. How was it? What did you observe?

A. It was quite high then and raising rapidly.

Q. Now, how long did you remain at the barn?

A. We hooked up, as usual, to come up at seven o'clock, as we went to work then, and I told the boys not to go uptown; that it looked to me as though something would happen down there. The water was awful swift.

Q. How long did you remain there?

A. I stayed there until about nine-thirty, I think.

Q. Now, what was the condition down there, at the end of the stream, on Willoughby Avenue, at that time?

A. A big stump had come down and struck the bridge and lodged there and the creek filled.

Q. What bridge was that?

A. The bridge across Willoughby Avenue.

Q. Who built that bridge?     A. The city.

Q. Then what happened?

A. Why the creek filled, the cribbing filled, and I went up home then, to see what was going to happen up at that end of town.

Q. Let me ask you, what was that that came down the stream and lodged at the bridge?

A. A big stump; there was a lot of stumps come

(Testimony of W. W. Casey.)

with it. One [187] big stump in particular struck the bridge, and it filled in behind that with stumps, logs, bridge timbers, some lumber.

Q. At that time how was the condition of the bulkheads? Could you see that? A. Oh, yes.

Q. With reference to the water? A. Yes.

Q. Where was the water going?

A. Going over the top then.

Q. Was it full? A. Oh, yes; full to the brim.

Q. What happened down there, if anything, where you were, down near the barn? Anybody living down there?

A. Yes; the water was high there and we moved two or three families before I went away—the Kelly family and I forget the other man's name now.

Q. I hand you Defendant's Exhibit "D," Mr. Casey, and ask you if you own any of the structures in that picture? A. No, sir.

Q. Was that where you—

Mr. COBB.—What was that question? I didn't catch it.

Mr. FAULKNER.—I asked him if he owned any of the structures shown in the picture, Defendant's Exhibit "D."

The WITNESS.—I was near there; I was right over here on Willoughby (indicating).

The COURT.—Wait a minute. Did you hear that?

Mr. COBB.—Yes, sir. I misunderstood as to the word "structures."

(Testimony of W. W. Casey.)

The COURT.—Where were you? He asked you where you were?

A. I was on my own platform, or on Willoughby Avenue, in front [188] of the houses you see here (pointing).

Q. On which side of Willoughby Avenue is that?

A. This (indicating)?

Q. No; on which side were you?

A. On Willoughby Avenue, or south of it.

Q. Your barn, you said, was on the seaward side?

A. Seaward side.

Q. What was the condition down in the creek, as shown in this picture, with reference to water at that time?

A. Well, water was going in almost every direction.

Q. Was there a good deal of water there or not?

A. There was a good deal of water there.

Q. Pretty well filled up, was it? A. Oh; yes.

Q. Now, where did you go from there?

A. I went up home.

Q. What time was that, approximately?

A. Well, as near as I can remember, it was nine-thirty, or about nine-thirty.

Q. In the morning? A. In the morning.

Q. What was the condition at your home after that time?

A. Well, the water had commence to cut into the bank along the road going to the cemetery and above the flume.

Q. Now, I will hand you Defendant's Exhibit 3



(Testimony of W. W. Casey.)

in this case, and ask you if you can mark there right over your house, a cross, so as to indicate it to the jury. A. (Witness does so.)

Q. Now, Mr. Casey, at that point, as shown in this picture, there is a bulkhead shown on the westerly bank of the stream. [189] When was that bulkhead placed there? A. After the flood.

Q. That was after the flood. Now, before the flood, what was the nature of that ground there?

A. High bank.

Q. About how high? A. Well—

Q. Approximately?

A. I suppose eight or ten feet.

Q. Was it a permanent bank? Describe the nature of the bank. What was on it.

A. It was a growth of timber and brush, big rocks, grasses—

Q. Any stumps? A. Some stumps.

Q. Where was the water going with reference to that bank at the time you were up there? Where was the water going in that direction?

A. Going over toward the Northern Laundry, down Eleventh Street and towards my house.

Q. What was the condition of the creek at that time? A. Very high.

Q. Very high. A. Yes.

Q. Was it slow or swift? A. Awfully swift.

Q. Water was going over the westerly bank, you say, in the direction shown by the picture?

A. Uh-huh.

Q. Now, what did it do to that bank?

(Testimony of W. W. Casey.)

A. Cut it away. [190]

Q. What else was over there in that vicinity—any other structures?

A. Many other houses.

Q. Whose houses were there?

A. Day owns a house there; owns two houses.

Q. Ray Day?

A. Ray Day, and others own houses there.

Q. Who else?

A. My son owns a house there—did.

Q. Now, you say that water was going over there at the time you arrived? A. Yes, sir.

Q. Nine-thirty in the morning? A. Yes, sir.

Q. Now, Mr. Casey, was there anything else there on that ground? Was there an electric tower there? A. Yes.

Q. Did you observe that tower? A. Yes.

Q. What happened in that vicinity, if you know?

A. There was a jam formed on that; it caught the timber and logs that came down and formed a jam there.

Q. Where did that water go that ran over on the west side of the bank near the laundry? In which direction did it go?

A. Some of it went down on Eleventh Street and the rest of it came down by my house and down over the bottom.

Q. Some of it followed the course of the bulk-heads?

A. Followed them around that way, right down towards the beach.

(Testimony of W. W. Casey.)

Q. Now, do you know what occurred further down on Eleventh Street, out towards the beach, where the old ball ground used to be, with reference to the water? [191]

A. Well, there was a culvert washed out down there, a culvert blocked up and flooded, and Mrs. Kabler's house was right in the wake of that, right in the line of that water. It flooded her house, washed out the road a little that goes down the extension of Willoughby Avenue, at C Street, E Street, and ran down to the beach.

Q. Now, at the time the water washed out the west bank near the laundry, you say there was no bulkhead up there at the time of the flood; I think you said there was no bulkhead up there in the vicinity shown in this picture.

A. A bulkhead here (indicating)?

Q. Yes.

A. There was no bulkhead there.

Q. The bulkhead was built afterward. Now, at the time the water washed over there and washed out that area, what was the condition of the cribbed channel?

A. Well, it was full, running as far as it could.

Q. It was broken?

A. It hadn't broken then.

Q. Now, was there water on the outside of the cribbed channel? A. Yes.

Q. Both sides? A. Yes, running right over.

Q. And clear up on top? A. Yes.

Q. What did you do there that morning?

(Testimony of W. W. Casey.)

A. Why, I went up there—

Q. Before you get to that, I will ask you if you did anything for anybody before you went up from the barn?

A. Oh, yes; we moved a couple of families that were in houses [192] near the creek.

Q. Now, after you arrived in the vicinity of your own house, what did you do, if anything?

A. Well, we went to digging a ditch to see if we couldn't kind of control the water a little bit. There was a number of men there with shovels and I got some more and we dug a ditch east of my house and got an old log and threw it in there, made a little wing dam like to steer the water away from my property, my house, as near as I could. It ran over the lots; and Ray Day and the boys and I we went up then to the creek, three or four of us, to see if we could do anything up there. Day came running down and said it was going to wash his house out, and we went up there to see if we could do anything, but the water was so swift that it was dangerous to get near.

Q. Made a dam, you say?      A. Yes, sir.

Q. Did you go to Gold Creek bridge that morning?      A. Yes, sir.

Q. I mean the bridge leading to the cemetery?

A. Yes, sir.

Q. What happened to that bridge, if anything?

A. It went out later.

Q. When was that bridge put in there, Mr. Casey?



(Testimony of W. W. Casey.)

A. It was there when I came here. That is, that bridge?

Q. That bridge?

A. That was put in in 1914.

Q. Now, had there been a bridge prior to that time? A. Yes, sir.

Q. When was that bridge put in? [193]

A. It was there when I came.

Q. In what year? A. 1898.

Q. What happened to that bridge?

A. They tore that down.

Q. Who tore it down?

A. Tom Bush and myself and some helpers that I had.

Q. You assisted them? A. Yes, sir.

Q. Why did you take that bridge down?

A. They had built a bridge to replace it.

Q. Why?

A. It was older, and he got a truck that would carry a yard and a half or two yards of gravel, to build the Goldstein Building, and he didn't think that this bridge was safe to carry it. They didn't consider this bridge safe for that kind of a load.

Q. That was the reason he built the new bridge?

A. Yes.

Q. Where did the bridge go on the 26th of September, when it went out? A. I—

Q. Where did it go when it went out?

A. Down the creek.

Q. Down the stream? A. Yes.

(Testimony of W. W. Casey.)

Q. Did anything else come down the stream that you know of besides stumps, rocks and logs?

A. A lot of other timber, logs and stumps and some lumber.

Q. Anything that you know of up in the basin that went out? [194] Anything that you know of, of your own knowledge, that came down?

A. There was another bridge. The lining out of the flume came down.

Q. What was the difference between the height of the bridge at Gold Creek that went out that day, the 26th of September, and the height of the old bridge that was there before that time? Which was the higher? A. The new bridge was higher.

Q. How much higher?

A. Probably, some place, between four and five feet. They used it for a staging to work on and I wouldn't be positive. I know I was on the lower bridge and we walked around under it, but it was not quite my height.

Q. And it was the higher bridge that went out this day? A. Yes, sir.

Q. What was the condition of the water in that vicinity, when you went home, if you noticed; that is, on the easterly bank of the creek?

A. There was little or no water running there, then.

Q. When the water went over there, how was it, swift current there? A. Oh, very swift.

(Testimony of W. W. Casey.)

Q. How did it compare with the water on the westerly bank? Was it as low?

A. Just as swift; possibly swifter. It was lower.

Q. Now, you say you were there when Mr. Eikland's house went out? A. Yes, sir.

Q. What happened to the house after it went out into the stream? [195]

A. Why it floated off and hit the bridge crossing Ninth Street and lodged there.

Q. Did it collapse? A. Yes, sir.

Q. What happened to Mr. Ingman's house?

A. It landed on the creek bottom and stayed there.

Q. Where is it now?

A. He moved it over on to another lot; lives in it.

Q. Still living in it? A. Yes, sir.

Q. Now, Mr. Casey, you say the water on one side of the bulkhead was flowing about the same as on the other side about that time?

A. Well, it was very swift every place it cut.

Q. Was the whole space in between filled with water? A. Yes; yes.

Q. Now, Mr. Casey, you heard Mrs. Michaelson's testimony yesterday about the smokehouse?

A. Yes, sir.

Q. That was down in the vicinity—

A. I know where that smokehouse was. It was in the block that the Government hospital is in now. We gave it to the Government, practically half, or a little over, of a block, which was on the corner on

(Testimony of W. W. Casey.)

the northwest portion of the other part of the block.

Q. You gave it to the Government, a portion?

A. Yes, sir.

Q. What happened to that smokehouse?

A. I tore it down.

Q. You remember when? [196]

A. It might be three years ago; four years ago, or something. I don't just remember. I know I gave it to the Indians and they took some lumber and the rest of it went for kindling.

Q. Were you familiar with Mr. Eikland's house?

A. Only with the appearance; outside appearance.

Q. And were you familiar with the values of property in Juneau at the time of this flood?

A. Yes; I know what some other property was worth.

Q. Now, you have been selling property?

A. Yes.

Q. And how had you been selling it?

A. We sold some lots, but things had gotten very quiet and the town had gone backwards very fast.

Q. What, in your opinion, would that house and lot be worth at that time? A. I don't—

Mr. COBB.—I don't think he is qualified, if the Court please, and I object. He sold some lots, but it doesn't appear that he knows anything about values so far.

The COURT.—Well, you might ask him if he was acquainted with the market value of property in that neighborhood at that time?



(Testimony of W. W. Casey.)

Q. Were you acquainted with the market value of property out there?   A. I think so.

Q. You lived in that tract?   A. Yes, sir.

Q. And say you had been selling property there?

A. Yes, sir.

Q. What was the market value of Mr. Eikland's house at that [197] time, and lot?

A. Oh, I suppose it would sell for twelve, fifteen hundred dollars.

Mr. COBB.—Now, I object to what he supposes. If he knows anything about it and knows the property—

The COURT.—(Interrupting.) Ask him what he knows.

Mr. COBB.—(Continuing.) He is qualified to speak.

The COURT.—Ask him what he knows as to what the market value of that property would be at that time.

Q. What would that be?

A. Well, I would state if I were buying, I would hate to give any more than that.

Mr. COBB.—I object to that and ask that it be excluded.

The COURT.—Yes.

Q. Give us your idea of what the property would be worth.

Mr. COBB.—I object to his idea unless he is qualified.

Mr. FAULKNER.—Well, a man can't tell what some property is worth unless he buys it or sells

(Testimony of W. W. Casey.)

it. The next best thing you can do is to get his opinion, and if he is qualified and knows the value of property in that vicinity, why his opinion as to the value of that property is the best evidence you can get on that point unless he bought this place or sold it.

Mr. COBB.—I don't agree with counsel. He can show, in addition to that, that the conditions in Juneau were such—it was war times then—that there was little demand for property. People were not buying and selling.

The COURT.—That is a matter of cross-examination for you. He has stated that he knew the market value of property. It is your privilege to cross-examine him at the proper [198] time, as to what his knowledge is. You can avail yourself of that privilege.

Q. Now, you say that it was worth twelve or fifteen hundred dollars? A. I—

The COURT.—(Interrupting.) Is that your opinion of it?

A. Yes, that is to say, that would be the market value.

Q. Now, Mr. Casey, did you observe the flood conditions and the damage done by the flood, this particular flood, on September 26, 1918, in other portions of this town and other places in the vicinity? A. Yes, sir.

Q. Now, describe to the jury what was done by that flood?

A. That evening, about four or five o'clock, or

(Testimony of W. W. Casey.)

something like that, some people telephoned down to me and wanted me to come up and see a slide up on Chicken Ridge—

Mr. COBB.—Now, we object to that.

Q. Just tell what you did, Mr. Casey.

The COURT.—Objection sustained; strike that out.

Q. Just tell what you did.

A. I went up to Charley Garfield's house to see regarding the safety of the building, whether or not it would stand or fall over the hill, and they were moving. They had moved their furniture out and I told them that if we struck a timber under a corner, it was safe enough to stand the storm, as the storm was subsiding.

Q. Where is his house?

A. Right at the head of this street (meaning Main Street).

Q. What had occurred that day?

A. One of the—a portion of the bank under it had washed away. [199]

Q. Of the lot? A. Of the lot.

Q. What else occurred in any portion of Juneau.

A. It slid away, or something. It went away, anyway. It wasn't there.

Q. What else occurred that you observed?

A. Some slides on Swede Hill.

Q. What happened over there?

A. There was at least two houses come down and hit Walter Bathe's house and piled up down on the road.

(Testimony of W. W. Casey.)

Q. Where was that, about?

A. That would be a block south of Front Street, right back of the Gastineau Hotel.

Q. How long had these houses been there, that you know of?

A. Well, the upper house, I think, was there when I came here, or about that time. The lower house, it was an old house, too. I couldn't say the exact number of years it had been there; probably fifteen, twenty years.

Q. Now, do you know Gillen's house?

A. Yes.

Q. What happened to that, if anything? Mr. Jim Gillen's house, do you remember it?

A. I don't recall.

Q. You don't recall. Now, did you observe, after the flood, any damage that was done up the basin road, what is known as the basin road?

A. Yes.

Q. What happened there?

A. A good portion of the road or the bank went out, and damage [200] done up the creek.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Mr. COBB.)

Q. Well this damage that you are talking about, the slide that occurred up there at Charley Garfield's place, that wasn't caused by the creek, Gold Creek, was it?      A. Caused by water.



(Testimony of W. W. Casey.)

Q. Answer my question. It wasn't caused by Gold Creek?     A. No.

Q. Don't you know that what went out, that you are referring to up there as that slide, was the loose earth which had slipped down that steep bank from the top of Chicken Ridge, that had been thrown out there when Wettrick built his house next to it?

A. I wasn't familiar with the ground before that time.

Q. You weren't familiar?     A. No.

Q. You didn't know that it was nothing else in the world but loose earth that had been thrown up there when Wettrick was building his house, and it slipped down the bank there, did you?

A. I had nothing to do with that building.

Q. You don't know anything about that?

A. No.

Q. But it wasn't the creek that caused it; it wasn't the high waters of Gold Creek that caused that?     A. It was rain.

Q. Well, answer the question. [201]

The COURT.—He asked you if it wasn't the creek that caused that.     A. No, sir.

Q. No. And up the basin road, those slides were simply caused by the rainfall, heavy rainfall?

A. I presume so.

Q. And not the high water in the creek.

A. Well, the flume at the bottom of the creek had washed out.

(Testimony of W. W. Casey.)

Q. The flume; that is, you refer to the flume that Dick Lewis put in?     A. Yes.

Q. Of the waterworks?     A. Yes.

Q. But the slides on the road weren't caused by the high water in the creek?

A. Well, if the creek had washed the bottom out, it might cause that slide.

Q. It might, but it didn't, did it?

A. I don't know.

Q. You don't know. Now, every year almost, they have slides up there with much or little rain, don't they?     A. Well, they have slides.

Q. You know of one big slide, don't you, that came down there and filled up the road for two or three hundred yards and about thirty feet deep?

A. Yes.

Q. When there wasn't any heavy rain either.

A. Possibly.

Q. Now Mr. Casey, coming back to this flume in the creek up there, how long is that flume? [202]

A. About twelve hundred feet.

Q. The Dick Lewis flume?

A. Oh, the Dick Lewis flume. I don't know; I don't know.

Q. Isn't over a hundred or a hundred and fifty feet long, is it—small flume?

A. Well, it's a small flume.

Q. Just protects the pipe-line where it goes under to get this spring water, that's what it was put there for, wasn't it?

A. Well, it was put in there for his water; yes.

(Testimony of W. W. Casey.)

Q. Now, that flume has about a twelve or fifteen per cent grade, hasn't it? Goes down very steep.

A. I couldn't—I wouldn't say.

Q. You wouldn't say how much grade, but you know it's steep?

A. Well, I know some water runs in it.

Q. Of course, water runs in it. Answer my questions fairly.

A. I don't know. I never was at the flume.

Q. You have been there lots of times and seen it, haven't you? A. From the road.

Q. Now, even at low stages of water, the water, down that grade runs very swiftly, doesn't it?

A. Why, I suppose it does.

Q. You suppose it does. Don't you know?

A. No, sir.

Q. Don't know? A. No, sir.

Q. May stand still there for all you know?

A. It might. I never was at the flume.

Q. You looked down on it lots of times?

A. Yes.

Q. Seen water running in it? [203]

A. I presume so.

Q. Don't you know.

A. Well, I never paid any attention to it.

Q. Didn't pay any attention to it. Do you tell this jury that you don't know whether you have ever seen water running in there or not?

A. I seen it was there to carry water. It was Dick Lewis' flume, and I wasn't interested.

Q. You wasn't interested in it. Well, how in

(Testimony of W. W. Casey.)

the world do you know then, that you built your flume with about a fifty per cent greater capacity.

A. You're talking about one flume; I'm talking about another.

Q. You told your counsel on cross, on direct examination, Mr. Casey—

The COURT.—Now, wait a minute. Don't argue with him.

Q. Didn't you state to your counsel, then, that you built your flume—

A. (Interrupting.) Yes.

Q. With a forty to fifty per cent greater capacity than the flume up the basin? A. Yes.

Q. Well, how do you know— A. Measured it.

Q. (Continuing.) Anything about it?

A. Know how wide it is.

Q. How is that? A. I know how wide it is.

Q. You say you didn't notice the grade?

A. No; I did not.

Q. Well, did you notice the depth? [204]

A. Well, measured it; yes.

Q. How is that? A. Measured it.

Q. Measured the depth of the flume up there?

A. Yes, sir.

Q. Did you do that? A. Yes, sir.

Q. And yet you don't know whether water even runs in it or not?

A. Yes; water runs in the flume over the water-works all the time, pretty nearly; yes, sir.

Q. Did you measure its length?



(Testimony of W. W. Casey.)

A. Why, if I remember right, I did, but it's so long ago I have just forgotten.

Q. But you know nothing about its grade—steepness?

A. Well, I don't. I'm not accurate on that.

Q. Well, can you answer this question: Hasn't it a great deal steeper grade than the flume that you built down on the flats?

A. Well, it may be more than two feet to the hundred, but I wouldn't say.

Q. Well, don't you know that the creek, the whole creek along in there, in the canyon, is a great deal steeper than it is when it gets out on the flats?

A. I presume so; it looks steeper.

Q. Yes; you presume so. Now, Mr. Casey, did you ever testify before in this case? A. Yes, sir.

Q. On the first trial, and the second, too, did you tell the jury that you saw a stump catch on the bridge at Ninth Street. A. Yes, sir. [205]

Q. Can you find it in your testimony? It's all printed.

A. Maybe; I don't know that I was asked that question.

Q. Oh, you wasn't asked that question.

A. Might not have been. I couldn't remember.

Q. You couldn't remember. You state that it was narrower down there? A. Yes, sir.

Q. And deeper? A. Yes, sir.

Q. Water ran swifter? A. Yes.

(Testimony of W. W. Casey.)

Q. Now, as a matter of fact, it runs out to the salt water?     A. Yes, sir.

Q. And the tide rises up in the lower end of it?

A. Yes, sir.

Q. When the tide comes up in it, it stops the current entirely, doesn't it?

A. Well, it depends on the height of the water. No; it never stops it entirely.

Q. Well, checks it up?     A. Checks it.

Q. Well, it checked it up?     A. It did.

Q. That causes a deposit there, doesn't it, of whatever is coming down the creek?

A. Unless it is very swift.

Q. How is that?     A. Unless it is very steep.

Q. Unless it is very steep. Now, I want to ask you a few questions—you testified about this plat, Mr. Casey? Well, [206] before I get to that, have you ever been in Mr. Eikland's house?

A. I don't suppose I ever was.

Q. Do you know anything about the construction of it?

A. No; only I seen it built there.

Q. You don't know the grade of the materials that went into it?     A. No, sir.

Q. How many rooms were in it, you don't know?

A. No, sir.

Q. Nor whether it had, what kind of foundation it had?

A. Why, I believe I seen him working on the foundation. I think it had concrete under it.

(Testimony of W. W. Casey.)

Q. You don't know anything about that construction—whether it was good, bad or indifferent?

A. No.

Q. Don't know how many rooms there were in the house, do you?     A. No.

Q. Upon what do you base this opinion that you have given, then, that it was only worth twelve hundred dollars?

A. Well, it was a small, rather small house, probably a story and a half, about twenty by thirty, some such size as that; might be bigger, maybe twenty-two by thirty.

Q. Might have been ten by ten, so far as you know?     A. No; it was larger than that.

Q. Bigger than that?     A. Yes.

Q. Well, you know that you and your partners were paid six hundred dollars alone for the lot?

A. Yes, sir.

Q. And do you think that that house could be built for anything [207] like an additional six hundred dollars?

A. No; I don't think it could.

Q. Don't think it could?     A. No, sir.

Q. But you think that anybody could have bought property of that kind, lot and all—a house that cost \$2700 and a lot that cost \$600—for \$1200 in 1918?

A. I think he would have had a hard time selling it for that.

Q. How's that?

(Testimony of W. W. Casey.)

A. I think he would have had a hard time selling it for that.

Q. You think he would have had a hard time. You think anybody could have bought it for that?

A. I don't know.

Q. You don't know.

A. Whether he could sell it for that or not.

Q. How is that?

A. It depends on whether he would have sold it for that or not.

Q. Now, isn't it a fact that on account of the war, there was but little dealing in property here, and you didn't cut the price of your lots that was on the market, did you?

A. About in two in the middle.

Q. How's that?

A. About in two in the middle.

Q. Whom did you sell to any cheaper than you had it on the market before?

A. Oh, to some.

Q. Did you advertise it on the market that you had cut prices?

A. No; no; we did try to sell some houses and lots that we owned there, but failed to do it in most instances.

Q. As a matter of fact, you don't know of any other property [208] selling about that time, do you?

A. Well, there was a deal made once in a while.

Q. Uh-huh. A. But not very often.

Q. No. Now, then, step down here, please. I



(Testimony of W. W. Casey.)

want to ask you two or three questions about this. Now, Mr. Casey, you understand this map. You have studied it a number of times?     A. Yes.

Q. Your property is where—the house that you are living in?     A. Right there (pointing).

Q. That was on the northwesterly side of the old channel, the original channel, as shown on this picture?     A. Northwesterly side of Tenth Street.

Q. That is what is marked as the old original channel?     A. Yes.

Q. Your property wasn't damaged on that occasion?

A. Well, the lot was washed; no, not the house. The basement filled up; couple of feet of water in it; couple of feet of water around the place.

Q. Now, the cribbing that you put in on the easterly side of your cribbed channel, across block 208 and block 209, along there, was that cribbing higher than the bank just back of it?     A. No, sir.

Q. The bank was higher than the cribbing?

A. No, sir; the cribbing—

Mr. FAULKNER.—Little louder; Mr. Casey.

A. The bank wasn't at the cribbing. It was back from the cribbing; built right in the creek bottom.

Q. Built right into the creek bottom? [209]

A. Yes, sir.

Q. But when you did get back of the creek to the bank, how far from the high bank was your cribbing?     A. Oh, it varied from—

Q. Well approximately.

A. From nothing at the upper end to probably

(Testimony of W. W. Casey.)

fifty, sixty feet, washed out up here, and back to nothing at the lower end.

Q. I'm not talking about the washout—how far it was from any washout.

A. I'm talking about that time.

Q. Was it as much as fifty or sixty feet?

A. Yes.

Q. Whereabouts was it fifty or sixty feet?

A. I wouldn't be positive, but I think—

Q. (Interrupting.) Well, we have got a picture here that shows that—Exhibit “G.” I want you to point out fifty or sixty feet of low ground on there that shows in that picture. While they're waiting for that, I will ask you another question: Was the top of your embankment higher or lower than the high ground back of it; that ground back of it.

A. Back of this, the ground, I suppose, was higher.

Q. Higher than the top of your embankment?

A. Yes.

Q. Then, this low ground back of it was a part of the creek-bed you say, was it?     A. Well, yes.

Q. In other words, you narrowed the creek-bed along there?

A. The bulkhead up there is straight.

Q. Well, you did narrow it, didn't you? You got the bulkhead built, the channel, the bulk-headed channel, was not as wide as the original channel? [210]

(Testimony of W. W. Casey.)

A. No; there was a wash in there.

Q. Part of the creek channel?

A. Water had run there sometimes.

Q. Now, I want you to point out to the jury on here that fifty or sixty feet wide, where it is fifty or sixty feet wide?     A. Right in there (pointing).

Q. Was your—

A. (Continuing.) Directly behind, or northwest; no, on the north side of the bulkhead and north of the Eikland house, due north as the flume would run.

Q. That is what you have pointed out, what you refer to as being fifty or sixty feet wide?

A. In the widest place. It commenced at nothing and ran out to fifty or sixty feet a couple of blocks long.

A. Now, none of that low ground was on Eikland's property?

A. I don't believe so. It was very close.

Q. How wide is the channel there?

A. Oh, between thirty and forty feet, thirty-eight feet.

Q. It wasn't just thirty?

A. No; it was built for thirty-five feet. Might be a little narrower or a little wider. I won't testify as to just thirty-five feet, but that is what it is supposed to be. At the upper end it was sixty. We're very close to the upper end now.

Q. Didn't you testify before that all along this portion of it it was only thirty feet?

A. Yes, it was thirty-five feet; over thirty.

(Testimony of W. W. Casey.)

Q. Didn't you testify before that it was thirty?

A. I don't think so.

Q. You heard Mr. Stewart's testimony? [211]

A. Oh, yes.

Q. That he measured it? A. Yes.

Q. And it was thirty? A. Yes.

Q. You never contradicted that, did you?

A. I don't know.

Q. Now, referring again to Mr. Stewart's map and to that portion of the cribbed channel that runs across block 208 and block 209, was the ground back of the flume, back of your cribbing, on the westerly side there, higher or lower than the top of the cribbing?

A. In some instances, it was about level; in some instances, it was, maybe, a foot or one log lower; in some instances, it is higher.

Q. Whereabouts was it higher and whereabouts was it lower?

A. This portion of the tract along here (showing) is quite a bit higher.

Q. That is on block 208?

A. 208. And along here in the fill, there is a place here, maybe one log sticks up, and then you get up here in 213, there was a place there that was much higher.

Q. That was a hump in there that you had to cut through? A. Yes, sir.

Q. There was some high piece of ground then about the alley? A. There was.

Q. In block 213, is that about where it was?



(Testimony of W. W. Casey.)

A. Block 213; down in here (pointing).

Q. There was a hump there you had to cut through?

A. Yes, sir. Block 208 shows itself it's higher yet. [212]

Q. But at the crossing, or intersection of Tenth, about at the intersection of Tenth Street and B Street, the top of your flume, or your bulkhead, on the westerly side, was lower than the ground behind it? A. Maybe one log inside there.

Q. Well, it was lower?

A. That is, in some portions. In some places there, there may be one log that sticks up.

Q. Now, you told the jury on this occasion that up to the time that you built your cribbed channel, there was no water at all flowing on what Mr. Stewart has marked as the original channel?

A. None at all; no, sir.

Q. Didn't you testify on the first trial of this case that there was water running in there, but that the most of it was running that way (showing)?

The COURT.—Wait a minute. You object?

Mr. FAULKNER.—What is that?

The COURT.—You object?

Mr. FAULKNER.—Yes; I'll ask counsel to cite the particular question.

Q. I am asking him if he so testified. Didn't you so testify? A. I don't think so.

Q. Didn't your counsel ask you this question on the first trial: Question: "Did any portion of it go

(Testimony of W. W. Casey.)

down in the channel that is marked on Plaintiff's Exhibit 'A'—that is, this map—"as the cribbed channel"?

The COURT.—What page?

Mr. COBB.—How's that?

The COURT.—What page? [213]

Mr. COBB.—That's on page 212.

Q. You remember that question being asked you?

A. No, sir.

Q. And you answered, "Yes." You remember answering that way?

A. It might have been; I don't know.

Q. Question: "Did the most of it go down there"?  
Answer: "A good portion of it; when the water was low; the most of it ran there." Was that your answer? A. I don't know.

Q. How is that?

A. I couldn't remember that; that's several years—

Q. If that was your answer, however, you didn't state that it all ran the other way—most of it ran in the cribbed channel—

Mr. FAULKNER.—There is one thing I would like to suggest. I don't think that counsel should read to the witness just one question or answer. I think Mr. Cobb ought to read, to be fair with the witness, the preceding question or two.

The COURT.—I can't understand it myself.

Mr. COBB.—Very well. I'm simply attempting to get at the facts of this case. How far do you want me to go back?

(Testimony of W. W. Casey.)

Mr. FAULKNER.—Well, this question here, I'll suggest that.

Q. "Whereabouts did the water go at that time, Mr. Casey, before the cribbing was put in on the banks of the creek?" Answer: "It would flow over at any place." You remember answering that? A. No, sir.

Q. "Did any portion of it go down in the channel that is marked on Plaintiff's Exhibit 'A' as the cribbed channel?" Answer: "Yes." You remember that? [214]

A. No; I can't recall those questions to mind.

Q. "Did the most of it go down there?" "A good portion of it; when the water was low the most of it ran there." Is that your testimony?

A. Probably it was.

Q. Now, on this occasion, you tell the jury that it all ran there.

A. No; I don't know as I did. It ran about that—when we built the channel, the water was very low in the winter-time at that time. We commenced to build that cribbed channel when there was little or no water and—

Q. (Interrupting.) Now, as a matter of fact, you know that there was a channel running over that way that carried a lot of water, don't you?

A. A number of years ago.

Q. Did it carry it in 1913?

A. In 1913 it blocked up or filled.

Q. Did it carry that water?

A. In the early part of that year.

(Testimony of W. W. Casey.)

Q. Didn't it carry it in August?

A. In the early part of the year.

Q. Didn't it carry in August?

A. I won't say what month it was.

Q. Didn't you approve and sign a plat here that showed that to be the stream on your ground?

A. To-day there is a ball ground on there.

Q. I'm not asking you about to-day, Mr. Casey. Didn't you, in August, 1913, sign a map and put it on record here, showing that that was the only channel? [215]

A. No; I don't think so. We signed the plat that was turned in. I'll say I signed that.

Q. You'll say you did do that.

A. I'll say I did. We signed that.

Q. And it showed that that was the only channel, didn't it? A. Yes.

Q. You didn't have it changed?

A. We didn't care to.

Q. You knew it was correct, didn't you?

A. There was water running there; lots of it running here, too (indicating).

Q. You were responsible for that flume—you and your partners? A. Yes, sir.

Q. You planned it? A. Yes, sir.

Q. And had it built? A. Yes, sir.

Q. At the time that you went up to Mr. Eikland's house, the day it was destroyed, did you observe, coming from your cribbed channel, at a point somewhere along about block 208, a strong current towards the easterly bank, after the cribbing had gone out? A. Well—



(Testimony of W. W. Casey.)

Q. Did you go towards the bank instead of alongside of it?

A. I didn't go up to Eikland's house.

Q. You didn't go over to Eikland's house?

A. No.

Q. You didn't see it?

A. I seen water flow over on that bank.

Q. You seen the water flow over toward that bank as though [216] you put—

A. (Interrupting.) Yes, sir.

Q. (Continuing.) As though driven by a wing dam?

A. No, it was the natural consequences. Water comes out of the basin in this shape and it strikes that bank, and there was a big jam formed there, and wherever—

Q. (Interrupting.) You don't claim that it doesn't show correctly the course of the cribbed channel?

A. Oh, yes, it does; but we're talking about the creek. It strikes this bank and cut over here. There was a big jam formed—

Q. Answer my questions. I don't want you to argue the case to the jury now.

A. (Continuing.) And then threw it over this way (indicating) and the natural consequences—

Q. (Interrupting.) Was it thrown over from here (pointing)?

A. Wherever it hit that bank on the curves, water was running this way (indicating).

Q. If the water was running over the course of

(Testimony of W. W. Casey.)

the stream, what was there to throw it against the bank?

A. The flume was full of rocks and debris and stumps—

Q. (Interrupting.) Full of logs that had come out of it, too, wasn't it?

A. And some house just below.

Q. It was full of logs that had come out of your bulkhead, wasn't it?

A. There was a couple of logs there after the thing went down.

Q. You did see them? A. Yes, sir.

Q. And they acted as a wing dam? [217]

A. The flume was full below there.

Q. How far down was it full?

A. At Ninth Street, Mr. Eikland's house was in there and so was the bridge.

Q. Below Ninth Street, it was full of debris?

A. Yes, sir.

Q. And the water just simply had to escape from the channel provided for it after it was blocked up? A. The channel was full.

Q. Full of debris so that the water couldn't flow through it. The waters along there from block 208 down simply had to escape at some place?

A. Yes.

Q. From the channel? A. Yes.

Q. Couldn't go through the flume or the cribbed channel? A. No.

Q. Just one other question, Mr. Casey. Come here just a moment. Counsel asked you something

(Testimony of W. W. Casey.)

about a tower going out and I now call your attention to plaintiff's—

Mr. FAULKNER.—Defendant's Exhibit "A" or 1.

Q. Defendant's Exhibit No. 1, and call your attention to the tower shown in the middle foreground of that picture. Is that the tower you referred to?

The COURT.—He didn't testify that any tower went out.

A. I hadn't been asked about any tower that I remember.

Q. What was it you were testifying about?

Mr. FAULKNER.—That jam at the tower there.

Q. Was that the tower that you referred to in your direct examination? It didn't go out? [218]

A. No, no; a jam formed there.

Q. What time of the day was that?

A. Oh, I suppose it was eleven, twelve o'clock.

Q. After your flume had quit carrying water?

A. Well, you couldn't see any more. Water was too high to tell anything about it.

Q. Didn't you state that a jam formed about nine o'clock; that the flume was full at the lower end? Didn't you state that a jam formed down at Willoughby at ten o'clock or nine o'clock?

A. Well, in the neighborhood of that.

Q. In the neighborhood of that; the same as Mr. Stearns said. A. I wouldn't be positive.

Q. And then immediately filled up behind?

A. Yes.

Q. So that at the time this jam up here, that you

(Testimony of W. W. Casey.)

are referring to, formed, why the waters along in the area shown in the middle of that picture had jammed up so they couldn't go down your flume?

A. We had—

Q. Answer my question.

A. No; the flume was full.

Q. Couldn't go down?      A. No.

Q. Just show us. Will you show us where that old original channel starts on that picture, the one that is marked "original channel" on there?

A. I believe I would say from there (indicating). At about Tenth Street, here, right here, we put in a bulkhead, timbers. Here is where I live. Here is the turn that the jam formed on—saved these house here and threw the water the other [219] way. Saved me from going down.

#### Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Casey, Mr. Cobb read some questions to you from the record in the former case. Now, I want to ask you if the next question that was asked you by me at that time was not this: "Did the most of it go down there"? referring to the cribbed channel?

Mr. COBB.—I read that, and besides they couldn't cross-examine him as to explanations of his testimony. They can't call his attention to his testimony in cross-examining him.

Mr. FAULKNER.—I think that would be all right. There is that question. I don't think it



(Testimony of W. W. Casey.)

makes much difference.

The COURT.—Objection overruled. He may read the questions.

Q. I'm just going to read one. And did you answer that— Question: "Did the most of it go down there"? referring to the cribbed channel, and did you answer that "A good portion of it when the water was low; most of it ran there"?

A. That would be my answer now. I suppose I said that then.

Q. Now, Mr. Cobb asked you about the slide up in the basin on the basin road, some years ago—a large slide. A. Uh-huh.

Q. Was that a landslide or a rockslide, if you know?

A. Part of the mountain came down. I think it was mostly rock.

Q. Now, how long, Mr. Casey, were the bulkheads built on the banks of Gold Creek by you from the lower end up to the upper end?

A. The distance and length?

Q. Yes; distance from one end to the other?  
[220]

A. About twelve hundred feet.

Q. What was the grade, if you know, at the upper end, compared with the grade up in Jualpa basin, where the waterworks flume is?

A. It's about a two per cent grade.

Q. Do you know whether there was any difference between that grade and the grade of the water company's flume?

(Testimony of W. W. Casey.)

A. I would suppose the water company's flume might be a little steeper.

Q. Do you know what the grade of Gold Creek is up in Jualpa basin? Do you know whether there is any difference between it up there and—

Mr. COBB.—I object to that as not proper re-direct examination. He wasn't asked anything about the basin. He was asked about the steepness of it coming through the canyon. Up in the basin there is a flat up there that is like the land down here.

The COURT.—I think your question was as to upper Gold Creek, though.

Mr. COBB.—How is that?

The COURT.—I think your question referred to upper Gold Creek.

Mr. COBB.—No; it was the canyon that I referred to, where this flume that they are talking about, is in place.

Mr. FAULKNER.—Well, the purpose of it was to show that there is a big flat up there and Mr. Cobb missed that in his statements.

The COURT.—Yes.

Q. Now, Mr. Cobb asked you about the construction of Mr. Eikland's [221] house. Did you see that house when it was being built? A. Yes.

Q. What, if anything, happened to it?

A. Fell over.

Q. Fell over?

A. Partly slid over on one side. Didn't fall over.

(Testimony of W. W. Casey.)

The house didn't fall over. The foundation gave way and it slid over on the ground.

Q. Now, there is one more question I want to ask you, Mr. Casey. At the lower end of this bulkhead, as shown in Defendant's Exhibit "D," I will ask you to state to the jury what is in there now.

A. Stumps and logs and rubbish.

Q. Now, are there any logs there, or just stumps?

A. Principally stumps, maybe logs.

Recross-examination.

(By Mr. COBB.)

Q. Mr. Casey, you spoke about his house falling over on one side, is that when it was in the process of construction? A. I believe it was.

Q. And the wind struck it before—

A. (Interrupting.) I believe it was enclosed, and I don't know how near completed it was.

Q. And it was before the foundations were put in; just put up so that the foundation could go in under at that time that the wind blew one of them under, didn't it? Or do you know anything about it further than the fact that it did go down?

A. I just know that it was laying over on one side on the ground. [222]

Q. And you know that it was also in the process of being built?

A. I don't know. It was enclosed.

Q. Well, then, can't you answer my question directly. Wasn't in the process of construction?

A. I suppose so. I don't know whether it was

(Testimony of W. W. Casey.)

completed inside or not. I don't think it was.

Q. You don't think it was in the process of construction?

A. I don't think it was completed inside. It was enclosed.

Q. Do you know whether the foundations had been put under it at that time?

A. Well, they generally build that as soon as anything, don't they?

Q. How's that?

A. They generally build that as soon as anything, don't they?

Q. I'm not asking you, Mr. Casey, what is generally done. I am asking you if you don't know that the foundations were not under there?

A. I don't know.

#### Redirect Examination.

(By Mr. FAULKNER.)

Q. Ever see a house built first and the foundations last?

Mr. COBB—I object to that as irrelevant and immaterial.

#### **Testimony of P. R. Bradley, for Defendants.**

P. R. BRADLEY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth the whole truth and nothing but the truth, testified as follows:



(Testimony of P. R. Bradley.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name, Mr. Bradley?

A. P. R. Bradley. [223]

Q. Where do you live? A. Juneau.

Q. What is your profession?

A. Mining engineer.

Q. How long have you been following that profession, Mr. Bradley? A. Twenty-six years.

Q. What qualifications do you have as a mining engineer?

A. I'm a graduate mining engineer from a well-known mining college.

Q. What college?

A. University of California.

Q. How long have you been following the profession? A. Twenty-six years.

Q. Now, are you familiar with the effect of the velocity of water in mountain streams? A. I am.

Q. And the erosive capacity of water?

A. Yes.

Q. Now, Mr. Bradley, how does the carrying or transportation capacity of water vary with its velocity?

A. It varies as the sixth power of velocity.

Q. As the sixth power of velocity.

A. Yes; that is to say, if you double the velocity of a stream, you would increase its transportive capacity by 64 times.

Mr. COBB.—How is that?

(Testimony of P. R. Bradley.)

A. If you double the velocity of a stream you would increase its transportive capacity by sixty-four times.

Q. Now, how does the erosive power of water vary with the velocity? [224]

Q. The erosive power of a stream will vary as the square of the velocity; that is to say, if you double the velocity of a stream, you will increase its erosive powers by four times.

Q. Can you just explain to the jury what is erosive power?

A. The erosive power is the scouring power—the power a stream has to scour the banks or the bottom. The transportive power is the power to carry the material after it has been scoured off.

Q. Now, have you had experience, Mr. Bradley, in the construction of bulkheads or flumes carrying streams? A. Yes.

Q. Now, I will ask you if, in your opinion, it would be a proper method of construction in constructing a flume or bulkhead to carry the waters of a stream like Gold Creek which flows into the waters of Gastineau Channel, to narrow the capacity or narrow the flume upwards, or narrow the flume at its mouth?

A. It all depends on the grade you gave the flume. If the flume has a greater grade than the stream, it doesn't need to have such a large cross-section at the bottom. As a matter of economy you could narrow it down and use less materials.

Q. What would be the object served in narrowing

(Testimony of P. R. Bradley.)

it? What would be the purpose of narrowing it, if any?

A. Well, the purpose of narrowing it would be to increase its velocity and thereby increase its transportive power to carry material away.

Q. Would it have any effect on its scouring power?

A. Yes; it would also have an effect on the scouring power.

Q. By narrowing it slightly, would it have a tendency to clear itself or not? [225]

A. Yes; it would have a tendency to clear itself.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Bradley, I don't know whether I understood you or not. You say that if you increase the flow of water, speed of the flow, that it increases the quantity of water that will pass a given point by from four to six times?

A. No; I said nothing like that.

Q. What did you say about that? What would be the increase in the capacity of a stream?

A. I was speaking about the increase in the erosive power or capacity of a stream, or the transportive capacity of a stream.

Q. Before you got to that, you said its carrying capacity. What do you mean by the carrying capacity—the quantity of water that would pass—

A. (Interrupting.) No; I mean the capacity to carry material.

Q. Oh, the capacity to carry material? A. Yes.

(Testimony of P. R. Bradley.)

Q. What would be the increase in the capacity of a stream to carry a volume of water. Wouldn't it vary directly as the speed and flow?

A. Oh, yes; if you double the speed you would double the carrying capacity of the stream.

Q. Now, it wouldn't necessarily have to be—

The COURT. — (Interrupting.) You mean, double the stream, double the flow of the stream?

The WITNESS.—Yes; double the stream.

Q. Wouldn't it more than double the flow because of the lack of [226] friction in the center?

A. Oh, yes; those things would enter into it theoretically, but not practically.

Q. Well, as a matter of fact, you wouldn't have to double the cross-sectional area of a stream to double its flow, would you, on the same grade, other things being equal?

A. All things being equal it would practically amount to that. There are a few elements entering into it that would change it one way or the other, but it would be very hard to say, offhand.

Q. Now, Mr. Bradley, you speak about the erosive capacity of a stream. If a stream of water is flowing straight along, no impact—flowing straight along the banks, past them, as it were, there isn't much erosion then, is there?

A. Oh, it depends on the character of the bank. You might have a solid bank and you might have a loose bank, in which case the erosion on the bottom and sides is apt to be great. With a rocky bank and bedrock sides, the scouring would be imper-



(Testimony of P. R. Bradley.)

ceptible, but whatever scouring there was would be multiplied by four, if you double the velocity.

Q. How does that compare with the erosive power of a stream when the stream is directed against the bank, either directly or at an angle?

A. Well, the velocity of the water would be somewhat impaired if it were directed against—

Q. (Interrupting.) How is that?

A. I say, the velocity of the water would be somewhat—

Q. (Interrupting.) I'm not speaking about the velocity of the water, but I'm assuming that the velocity was the same, whether it was running a course directly and then turned and there was an impact against the bank, either at an angle [227] or directly. What is the difference, then, in its erosive power?

A. There is no difference in the erosive power. The erosive power varies as the square of the velocity, no matter in what direction it might be going.

The COURT—He means the erosive effect instead of erosive power.

Q. Is there any difference between the erosive effect of a stream being directed against a bank and being allowed to flow right past it?

A. Oh, yes; it gives the stream a chance to effect its full erosive power.

Q. The erosion is much greater when it is directed against it?

A. Yes; it would be. A stream has more chance then to work up to the limit of its erosive power.

(Testimony of P. R. Bradley.)

Q. Now, Mr. Bradley, you say that a flume, to carry the waters of a creek, should be narrowed at the outlet under certain conditions, as I understood you. What are those conditions?

A. Oh, I think I was asked a hypothetical question.

Q. Oh, you were asked a hypothetical question.

A. What considerations led up to the narrowing of a flume. I didn't say they should be.

Q. Didn't say they should be? A. No.

Q. Well, assuming that a flume is discharging into salt water there, and the tide ebbs and flows there, would you think under those conditions it should be narrowed in order to keep it clear?

A. Yes; if the water that is going through the flume carries any sediment. [228]

Q. If it carries any sediment.

A. It would be desirable to increase the velocity.

Q. The tide would have an arrestive effect—when the tide rises up into the flume it checks the current? A. Naturally.

Q. Naturally. Causes it to deposit whatever is coming down there during the period of high tide?

A. Naturally that would be deposited on account of the diminished velocity.

Q. Assuming a two per cent grade in a flume that runs across the delta—twelve hundred feet across the delta of a stream that discharges into salt water, and that the stream, at periods of high water, brings down debris of various kinds, such as logs and stumps and those things, I will ask you

(Testimony of P. R. Bradley.)

if, when you narrow it at its mouth, narrow your channel more than it is above, if it isn't very likely that, with all that debris that is coming down, if two or three or more logs or stumps get opposite each other, practically filling the width of the channel, when it gets to the narrower place it won't be pushed together to the sides and jam?

Mr. FAULKNER—Just a minute. We object to that as not cross-examination. It might be very interesting, but it is a matter for argument.

Mr. COBB.—No; he is testifying as an expert. That is the condition—

The COURT.—(Interrupting.) Objection sustained—not proper cross-examination.

Mr. COBB.—How is that?

The COURT.—Objection sustained. He wasn't asked about that.

Q. Well, I'll ask you then, did you take any such matters as [229] that into consideration in stating that this flume was properly constructed?

Mr. FAULKNER.—The same objection to that question.

The COURT.—Objection sustained.

Mr. COBB.—How's that?

The COURT.—He didn't state the flume was properly constructed.

Mr. COBB.—I believe he did.

The COURT.—You can go to the record.

**Testimony of R. G. Day, for Defendants.**

R. G. DAY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Day, will you state your name?

A. Ray G. Day.

Q. Where do you live?

A. Eleventh and B Streets.

Q. In Juneau?      A. Yes.

Q. How long have you lived in Juneau?

A. Since 1912.

Q. Were you in Juneau on the 26th of September, 1918?      A. Yes, sir.

Q. Where were you that day, Mr. Day?

A. I was at the Empire office until about ten o'clock. After that I went out to the Casey-Shattuck Addition.

Q. How long did you say you lived in Juneau?

A. Since 1912.

Q. What time did you go out to the Casey-Shattuck Addition?

A. About ten o'clock in the morning. [230]

Q. You live at—

A. Corner of Eleventh and B.

Q. On the Casey-Shattuck Addition?      A. Yes.

Q. I'll hand you a photograph marked Defend-



(Testimony of R. G. Day.)

ant's Exhibit No. 1, and ask you to mark with a lead pencil over the roof of your house, if it is shown.

The COURT.—Mark it D. There is one other mark there now.

Q. Mark it D, then.

(Witness does so.)

Q. Now, if you'll just point that out to the jury, too. Take the photograph and show to the jury just where your house was.

(Witness does so.)

Q. You say you went out to your house that day?

A. Yes; about ten o'clock—

Q. (Interrupting.) What time did you get there?    A. About ten o'clock in the morning.

Q. Did you observe the creek at that time?

A. I did.

Q. What was the condition of Gold Creek when you arrived there?    A. It was flowing all over.

Q. What do you mean by "all over"? Where?

A. Well, the water at the upper end started to go down Eleventh Street.

Q. Now, perhaps you can come down to this plat, Mr. Day, and show us on that.

A. Right in here (showing).

Q. Perhaps we can do it better on the photograph. Witness isn't familiar with the plat.  
[231] You say water was going all over?

A. Yes.

Q. Did you see the cribbed channel, where the cribbing had been built?    A. Yes; part of it.

Q. Now, what was the condition of that with

(Testimony of R. G. Day.)

reference to water?     A. In what part?

Q. At the upper end.     A. Yes.

Q. Was there water on the outside of the cribbed channel?     A. Yes, sir; there was.

Q. On which side?

A. On the west side; at the upper end.

Q. Water on the east side, too?

A. Yes; a little farther down.

Q. Now, on the upper end, Mr. Day, what was the natural land in there above the cribbed channel; as the creek comes out under the Gold Creek bridge, what is the natural ground on the right-hand bank?

A. You mean on the west bank?

Q. Yes; on the west bank.

A. Natural ground, stumps, boulders.

Q. Permanent bank?

A. Yes; there was some willows in there, too.

Q. Was there any water going over that bank?

A. When I first got out there, there was.

Q. Was there any bulkhead there at that—I mean up at the upper end of the stream?

A. Well, right at the intersection of the channel and Eleventh Street, there was a bulkhead at that time. [232]

Q. From there on up there wasn't any.

A. My recollection is there wasn't any.

Q. Now, you say water was going over that?

A. It was going both over and under.

Q. You know where the Northern Laundry is?

A. Yes, sir.

(Testimony of R. G. Day.)

Q. Where was the water going with reference to that?

A. It was coming right down at right angles.

Q. Now, can you show the jury on that photograph where the water was going? Just bring it over to the jury please.

A. Here is the corner of the Northern Laundry; there is the tower (indicating). The extreme corner of the Northern Laundry runs out square, like that (showing). That's in the street—that tower. The bulkhead on the creek was further over (indicating) and the water had cut both over and under the cribbing and was running down Eleventh Street and across this way.

Q. How far up did that water start, that you show on that photograph?

A. Right here? Went right by the tower.

Q. What about the upper portion right here (indicating)? Did it cut in there?

A. I don't remember much about that.

Q. Does the picture show it?

Mr. COBB.—Well, that's a question the jury can see for themselves.

Q. Now, what did you do there that morning?

A. We got started at work on the west bank of the creek right away.

Q. What did you do? [233]

A. We tried to construct a temporary bulkhead.

Q. To keep the water from going where?

A. Keep it from going down Eleventh Street.

Q. That was on the west bank? A. Yes, sir.

(Testimony of R. G. Day.)

Q. And your home was on the west side?

A. Yes.

Q. How great a quantity of water was there over there around your home?

A. Well, it varied according to the time of the day.

Q. Well, from the time you arrived there, just describe conditions with reference to water?

A. It kept eating under—it kept getting worse until two o'clock in the afternoon. The high water was about two; between two and three.

Q. The highest water was between two and three?

A. That is, on that side; yes.

Q. What did you do there during the time that you were there?

A. The only thing we could do was to fill sacks full of cinders that we got from the cinder dump of the Northern Laundry, and put in brush in between.

Q. Did you assist in moving anybody's property?

A. Two of them; yes.

Q. Whose property was that?

A. One was in the Secrest house, directly across the street, and the other was in the Joe Kahrer house which was next door to the Secrest house.

Q. You helped move Billy Casey?

A. No; I wasn't down there.

Q. What is that? [234]

A. I wasn't down there.

Q. See anybody moving? A. Yes.

Q. Mr. Day, you observed the rainfall that day?

A. Yes.



(Testimony of R. G. Day.)

Q. And the condition of the waters in the creek?

A. Yes, sir.

Q. I will ask you if, within your memory, you have seen as high a period of water?

A. No, sir.

Q. Ever see as great a rainfall as there was on that day?      A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. How long have you been here, Mr. Day?

A. Since 1912.

Q. You know of the high water in 1913?

A. I was out to Salmon Creek in 1913.

Q. You were up to Salmon Creek?

A. In the summer.

Q. You didn't notice the height of the water in Gold Creek that year?      A. No, sir.

Q. Were you here in 1915?      A. Yes, sir.

Q. How did that compare with the waters of 1918?      A. Well, it wasn't near as much.

Q. It wasn't near as much?      A. No. [235]

Q. Now, Mr. Day, was anybody's property on the west side of the creek damaged that day?

A. Yes, sir.

Q. Washed out?

A. You mean houses washed away?

Q. Yes.      A. No, sir.

Q. What damage was done?

A. The damage—most of the damage was done to houses from the flood water and a lot of—in

(Testimony of R. G. Day.)

some places, there was from four to six inches of mud. The basements on most of the west side of the creek were flooded.

Q. What time of the day did that happen?

A. The highest water, that day, was between two and three o'clock is my recollection.

Q. Was it in the afternoon that the waters got so bad?

A. The water got worse in the afternoon.

Q. Got worse?     A. Yes.

Q. Now, about opposite the Northern Laundry, where you speak about this high ground or permanent bank being washed out, the bulkhead had given way, hadn't it?

A. The bulkhead was undermined.

Q. Undermined?     A. Yes, sir.

Q. Explain what you mean by that. Describe to the jury what you saw of that undermining.

A. Water was running both over the cribbing and it had eaten out under the cribbing. It was a log cribbing, filled with [236] rock in behind. It gradually ate under it until it was undermined, eating the ground out as it went, and finally the bulkhead went.

Q. Had the bulkhead given entirely away or been washed out?

A. The bulkhead stood there long after the high water.

Q. How is that?

A. The bulkhead was there long after the high water.

(Testimony of R. G. Day.)

Q. After the high water at that place?

A. Yes.

Q. But it had been undermined so a strong current could come under and cut out the bank?

A. It did; yes, sir.

Mr. COBB.—That's all.

### **Testimony of H. T. Tripp, for Defendants.**

H. T. TRIPP, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Tripp, will you state your name please?

A. H. T. Tripp.

Q. Where do you live?       A. In Juneau.

Q. How long have you lived in Juneau?

A. I have made my home here since 1904.

Q. Were you in Juneau on the 26th day of September, 1918?       A. No, sir.

Q. What is your business, Mr. Tripp, or profession?

A. I have always been in the mining business, hydraulicking and lode mining—mining work, generally. [237]

Q. Have you had any experience in the construction of flumes and bulkheads?       A. I have.

(Testimony of H. T. Tripp.)

Q. In streams. Have you had any experience in this country?

A. I have had considerable in this country.

Q. Were you familiar with the flume that was constructed in Jualpa basin to carry the water of the creek over the springs of the Juneau Water Company? A. Yes, sir.

Q. Did you construct that?

A. Yes; it was my idea. It was presented to me. The situation was presented to me and it was my idea of how to remedy the condition that existed, and I was asked to take charge of the work, which I did.

Q. What was the condition up there? Well, I'll ask you, when did you do that work?

A. Well, I have forgotten whether it was in 1913 or '14. I don't remember now what year it was.

Q. What was the condition there before you did the work? What was there?

A. The condition was that there was a concrete flume that had been constructed to convey water over the flume—

Q. (Interposing.) Over the springs?

A. Yes; over the springs, rather, and the flood was undermining the walls of that concrete and digging out the floor of it, and the concrete structure was in such a condition that it was trembling and they were afraid that it was going to collapse, and that was at the time of a flood and something had to be done immediately in order to save it.



(Testimony of H. T. Tripp.)

Q. Now, you say the water was undermining it?  
[238]

A. Grinding it underneath the rocks and debris coming down. The big rocks were cutting the bottom of the concrete flume and they had cut away on the edges of the corners underneath or at the bottom of the wall, all along on the line of the flume, on both sides, and also cut into the bottom of the concrete.

Q. And you say at the time you put in the lining that there was a period of high water?

A. There was high water and that was what was bringing down these rocks and debris that was doing the damage.

Q. What did you do there with reference to the construction of the lining?

A. Well, it was rather a complicated proposition to construct a flume or something that would save it at that time, during the flood—

Mr. COBB.—(Interrupting.) I think that I shall object to that as wholly irrelevant and immaterial. I don't know what the purpose is. This is another flume.

The COURT.—I'll hear from the other side.

Mr. FAULKNER.—If the Court please, I want to show the construction of that flume up there. The testimony is that it went out. I want to show how it was constructed, what it was put there for, the amount of lumber in it and the nature of the construction, and I want to show—

Mr. COBB.—The testimony is not that the flume went out.

Mr. FAULKNER.—No; the lining.

Mr. COBB.—The lining went out. What has that to do with it?

The COURT.—What is the purpose of it.

Mr. FAULKNER.—The purpose of it is to show the nature of [239] that construction, to show the capacity of it and to show what this flood did, as having a bearing on the question of whether or not this was an unprecedented flood. Mr. Tripp testified before, I think, the same way.

Mr. COBB.—On the first trial; not the last trial. The point is this: The fact that the lining went out there might be due to any one of various causes—might not involve the flood alone. It would require us to go in and try a side issue.

Mr. FAULKNER.—No; if the Court please—

Mr. COBB.—(Interrupting.) The mere fact that it went out may explain some of the lumber down there. To go into the construction of that flume and all that sort of thing, I think is wholly irrelevant and immaterial. It is an entirely different kind of flume from the one built below *where*, which did this damage.

The COURT.—I think I'll sustain the objection.

Mr. COBB.—Yes—

The COURT.—The only purpose that I could see would be to show the size of the lumber and the size of the debris coming down from that flume.

(Testimony of H. T. Tripp.)

That might become material to show the lumber that was found in the debris below.

Mr. FAULKNER.—I'll state to the Court that there will be testimony showing the stage of water in that flume on that day and the character. I want to show the character of the construction, and then show by other witnesses just what happened with reference to that construction during the day, and then show that it went out. Of course, the lumber naturally went down and the testimony already is that the flume went out. We have got that in the record already. But I [240] want to show the character of the construction and then the stage of the water—how much water had been in there before and how much was in there that day and what it was that took it out, as having a bearing on the character of the flood. That is the purpose of this phase of the examination. There is no way to get at the character of the flood except by that sort of testimony.

The COURT.—Well, I'll admit the testimony subject to being stricken out.

Q. Now, will you describe, Mr. Tripp, the construction of that lining, just briefly.

A. The structure had to be built during the time of the flood and consequently had to be built over the flood and be hung in the concrete flume. Consequently, there were long caps of eight by eight dimensions and then hanging from that to go down, within a foot or so of the running water, which was about half full—I think the concrete

(Testimony of H. T. Tripp.)

flume was running about half full of water—that whole structure had to be built and constructed so that it was one continual line of this flume. It was lined on the bottom and on the sides.

Q. What was on top?

A. On the top was a tie that ran clear through and it was all set up on posts, so that at the given time, why it would all be lowered into the water. It was fastened by cables.

Q. Now, across the top between the posts was there anything? A. What is that?

Q. Across the top of the flume?

A. Over the outside of each wall was a cable, and from that were posts running down temporarily until the flume would be lowered into its place.  
[241]

Q. How was it fastened there?

A. By big cables.

Q. How much lumber was used there?

A. I don't remember exactly how much there was.

Q. Give us your best recollection?

A. Oh, I don't know; possibly thirty thousand, forty thousand. I don't know exactly what it was. I don't remember just how long it was. I know the cross-section of the flume was something like twenty feet, eighteen, twenty feet, or maybe a little more. I don't remember exactly.

Q. And you say you constructed that during a period of high water? A. Yes, sir.

Q. And it was *in year* 1913 or 1914?



(Testimony of H. T. Tripp.)

A. Yes, sir.

Q. Now, how high was the water in there at that time?

A. I would say it was about— The concrete flume was running about half full.

Q. About half full? A. Yes.

Q. Now, did you see the bulkheads that were constructed by the defendants in this case, across what is known as the Casey-Shattuck flats?

A. I have seen them.

Q. Did you see them at the time they were being constructed?

A. I was out there during the time of construction.

Q. Were you consulted about the method of construction?

A. I was out there and I was asked for my opinion as to whether or not that was suitable construction. I remember that well enough. [242]

Q. Now, in your opinion, as an engineer and as a constructor of flumes and bulkheads, was it proper construction?

A. I consider it good, suitable construction, as long as the timber would last. It was built of logs mostly.

Q. Now, Mr. Tripp, the testimony shows that the stream between the bulkheads was narrowed—the distance between the bulkheads was narrowed some four or five feet at the lower end where the stream goes out into the bay. I will ask you if,

(Testimony of H. T. Tripp.)

in your opinion, that was the proper method of construction of that bulkhead?

A. Well, that is generally considered good construction. It is good engineering as a general thing, and a matter of economy.

Q. What is the purpose of that?

A. Well, the general purpose of construction of a flume, or a way to convey water, is to keep the water confined in a certain channel; and it generally isn't any larger than it is calculated to carry the water, as a matter of economy generally.

Q. Now, if you have sand and gravel coming down a stream of that nature, what would be the effect upon that, if you have sand and gravel coming down and being deposited where possible, what would be the effect on that sand and gravel in the bottom of the creek, if you narrowed the sides of the creek?

A. Well, the more the water that is kept together, the better it is so long as you can confine it.

Q. Would it make the water flow swifter or slower if you narrowed it? [243]

A. It would have a tendency to make it flow swifter.

Q. Would it assist in keeping the bottom cleared out or not? A. Yes; it would.

Q. You say you weren't here on *November 26, 1918*?

A. No; I was at Eliza Harbor, looking over a power proposition.

(Testimony of H. T. Tripp.)

Q. Now, after you returned to Juneau, did you go up into the basin?      A. Yes; I did.

Q. What did you observe there with reference to the structure you had built?

A. Found it all gone.

Cross-examination.

(By Mr. COBB.)

Q. Was the concrete gone?

A. No; the structure that I had put in.

Q. Just the lining—      A. (Interrupting.) Yes.

Q. (Continuing.) Went out? The lining was all dropped in at one time?

A. Yes, sir; there were iron plates made to drop down in front of this at the time that this was to be launched, and there was a given distance for it to go down before it would come to its place, and when those aprons were dropped down in front, the water ran in on top of the flume and the water ran out of it and it settled to its place.

Q. Settled right down?      A. Yes.

Q. What was the length of that flume?

A. I don't remember what the length was—two or three hundred [244] feet; maybe three hundred feet; maybe more; maybe less. I don't remember exactly.

Q. Do you remember the grade of it?

A. It was a steep grade. I don't remember what it was. In fact, I never took the grade of it.

Q. You never took the grade of it. You know it was very steep, though?      A. Yes.

(Testimony of H. T. Tripp.)

Q. Water went through there a-whizzing?

A. You bet it did.

Q. Great deal steeper than the grade of the flats down here, where this bulkheaded channel was?     A. Yes.

Q. Great deal steeper?     A. Yes.

Q. And a smooth bottom?     A. Yes.

Q. No rocks or gravel in there at all. Now, Mr. Tripp, were you employed to plan this flume down across the flats by the defendants or to give Mr. Casey an opinion; or was it a casual opinion given to a friend?

A. Well, I happened to be out there one time and I went over the proposition and we walked up and down the flume and went over the proposition.

Q. You were not employed?     A. No, sir.

Q. Ever go over it more than once for the purpose of giving this opinion?

A. I don't think so; no.

Q. Did you take into consideration, in giving that opinion, and [245] the opinion you have expressed now, that the ends of the cross-pieces that bound the two walls of the bulkhead together, were left projecting into the channel?

A. Oh, I remember that there were, that there were pieces, short pieces, that were running out into the walls and that they came there and acted as a sort of a tie on the ends of the logs.

Q. Did you take into consideration the possible danger there might be from debris—one end of a log for instance—butting up against one end of



(Testimony of H. T. Tripp.)

those projections and the other end of the log swinging around and lodging against the other side?

A. I don't remember that there was anything that caused special consideration along that line. I don't think there was anything that was more than ordinarily noticeable in that regard.

Q. You didn't take into consideration a thing like that at all, that might happen to dam up the whole concern—throw the water all over the flats?

A. No.

Q. Instead of carrying it out through the stream?

A. I don't remember any such thought.

Q. Well, as a mining engineer, don't you know that there is danger of that happening in that kind of construction?

A. Yes; I know that there is always danger in that kind of a place.

Q. Yes. Mr. Tripp, you say that you think it is proper to narrow that kind of flume at its lower end where it goes into salt water?

A. Generally customary to narrow any flume where there is an increased velocity as it goes further down on a steep grade, why, it increases its speed and it isn't generally considered [246] necessary to have the flume so large.

Q. Suppose the grade isn't increased—running on the same grade?

A. Water will generally increase. It is hard to say definitely. Every proposition of that kind

(Testimony of H. T. Tripp.)

has to be considered by itself. I don't think there is any regular law for it.

Q. Well, if it is shown by the testimony that this flume runs out and discharges into the channel, into salt water, where the tide ebbs and flows, with that sort of an outlet, would you narrow it?

A. It wouldn't make any difference whether it was wide or narrow, with the tide coming in, and during the stage of high tide, why, of course, the current would be—

Q. (Interposing.) Checked?

A. (Continuing.) Checked; yes.

Q. And debris deposited?

A. It could, or would, of course, help to deposit it. It would clear itself, however.

Q. Clear itself to some extent as the tide went down? A. Yes.

Q. According to the volume and force of the water? A. Yes.

Q. But it wouldn't clear itself until the tide did go down? A. No.

Q. Now, then, Mr. Tripp, considering the nature of the watershed is such that, in times of high water or flood, such as this country is subject to, that stumps, trees and logs and timber would be brought down, I will ask you if there isn't danger, with debris of that kind coming down and if you have narrowed the mouth of the channel, that there would be a jam or wedge [247] formed at that narrow place—these logs and stumps and timbers all coming down together at one time and being

(Testimony of H. T. Tripp.)

pressed together and held that way by the constriction of this outlet, isn't that a danger?

A. It's a very hard thing to tell just what will happen in case of a flood. It might be and it might not be a danger. It might help clear it up and it might possibly be the means of causing a jam; but the more the water can be confined, so long as it carries within those confines, the more force and power there is to clear the deposits.

Q. Oh, I understand that, Mr. Tripp, but the question that I am asking you, you haven't answered yet. Would there, in the case that I put to you in the preceding question, wouldn't there be danger of debris that comes down in high water, such as stumps and timber, forming a jam at that narrow outlet?

A. If there was a place for the debris and rubbish to hang to, if there was a place for it to hang, I would say, yes; otherwise—

Q. (Interrupting.) Exactly.

A. If there was an increased speed, I would say that it would help to clear it.

Q. If a log— The channel above this outlet, we'll assume, is thirty feet wide. At the outlet it is twenty-five feet. If a log coming down there, twenty-seven feet long, or a piece of timber anywhere between twenty-five and thirty feet in length happened to get almost straight across the channel at the time it struck the narrow place, I will ask you what would likely happen? [248]

A. Naturally, if a log went down a place like

(Testimony of H. T. Tripp.)

that and happened to go so that it would be perfectly square across the stream or straight across the stream and it hit on two ends and had a chance to hang up, why it would naturally stop there.

Q. Naturally stop there?      A. Sure.

Q. The more pressure there would be brought against it, the tighter it would jam?

Q. Yes; it would either be broken, or else it would stay there probably.

Q. And if two or three big stumps coming down there, or a whole flock of them, six or seven or eight feet through or more, and all should happen to get alongside of each other at that narrow place, wouldn't there then be danger of jamming?

A. There is always danger, Mr. Cobb, in a flood. It is hard to tell what might not happen.

Q. I am asking you as to its construction. Now, in giving your opinion that it was proper to narrow this flume at the lower end, did you take any of those things into consideration?

A. In connection with that flume?

Q. Yes.

A. I don't think I gave an opinion to that extent.

Q. Oh, you didn't give an opinion that that flume was—

A. (Interrupting.) No, I just walked along with Mr. Casey during that time that we talked about. So far as that channel is concerned, I had no hand in planning that flume out there, or waterway.



(Testimony of H. T. Tripp.)

Q. Did I understand you to answer counsel on the other side that [249] you thought that flume was properly constructed?

A. I thought that it was fairly well constructed; yes; and I say so now, so far as that is concerned.

Q. Say so now. Well, then, in giving that opinion to Mr. Casey, did you take into consideration these dangers that I have just mentioned, of jamming at the lower end, or a jam occurring by reason of these projections into the channel?

A. My opinion at that time—I'll state I didn't go into it sufficiently to take into consideration every detail. I was not employed as an engineer to plan that flume, and I just simply walked over a part of it. I don't think, at that time, that I saw the lower end of it.

Q. It's nothing unusual, Mr. Tripp—you have been here a long time, I believe you said—it's nothing unusual, in the case of high water in these streams here, for a lot of logs and stumps and timbers to come down Gold Creek, is it?

A. There is generally some—

Q. (Interrupting.) How is that?

A. Everything is cleaned out along the line generally when there is a flood. In ordinary high water stages, there is everything that can get into the stream, and when the stream changes its course, it generally brings down something more.

Q. Would naturally come down. The watershed up there is steep; steep banks and canyons all along up and down that stream? A. Yes.

(Testimony of H. T. Tripp.)

Mr. FAULKNER.—I object to that as not proper cross-examination.

Mr. COBB.—I think it shows the character—

The COURT.—Objection sustained. [250]

### Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Tripp, if where the outlet of this stream was narrowed, the lining was smooth, smooth lining in it, would that make any difference, in your opinion, as to whether it would clear itself or not?

A. Certainly would.

Q. Now, let me ask you one more question. Mr. Cobb asked you whether the velocity, or something to that effect, whether the velocity on a two per cent grade wouldn't be the same all the way down. Now, let me ask you this question: If you took a two per cent grade, or take a slope of any kind, and have water flowing down it, would the water flowing up at the upper end of the grade be as swift—would the flow be as swift as it would be at the lower end, if it was two per cent all the way down? A. No, it increases in velocity.

### Recross-examination.

(By Mr. COBB.)

Q. Soon run dry, wouldn't it? A. How is that?

Q. So; if it kept increasing in velocity, it would soon run dry, wouldn't it? A. No.

Q. The whole stream?

(Testimony of H. T. Tripp.)

A. There are certain laws that govern those things.

Q. How is that?

A. The law of acceleration governs those questions. [251]

**Testimony of Emil Gastonguay, for Defendants.**

EMIL GASTONGUAY, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name?

A. Emil Gastonguay.

Q. Where do you live? A. At Thene.

Q. How long have you lived there?

A. Since the spring of 1914.

Q. What do you do? What is your profession or duties? A. Chief electrician—

Q. For what—what company?

A. Of the— In charge of the power division.

Q. Of what company?

A. Of the Alaska-Gastineau Mining Company.

Q. Where is their property?

A. Well, situated, some at Salmon Creek, Thane, Perseverance, Annex Creek, Carlson Creek.

Q. What is at Perseverance? A. Mine.

Q. And the company was engaged in mining?

(Testimony of Emil Gastonguay.)

A. Yes.

Q. How long have you been with that company?

A. Since the spring of 1913.

Q. Where is the Perseverance mine located with reference to Juneau? For the purpose of the record, just tell where it is located—how far from Juneau. A. Four miles. [252]

Q. In which—

A. (Interrupting.) Up Gold Creek.

Q. Gold Creek, near the head of Gold Creek?

A. Near the head of Gold Creek.

Q. Now, what did the company have at Salmon Creek?

A. They have the power installation at Salmon Creek,—dam, waterways and power plants.

Q. Flume up there? A. Flume.

Q. Where else do they have property?

A. At Thane and Annex Creek.

Q. What is at Thane?

A. At Thane is a milling plant.

Q. How far is Salmon Creek from Juneau?

A. Well, the creek itself is nearly three miles, but the power plant, lower power plant, is about two and three-quarter miles.

Q. In what direction?

A. That would be northwest.

Q. In which direction is Thane from Juneau?

A. That would be southeast.

Q. Where is Annex Creek?

A. Annex Creek is in Taku Inlet.

Q. How far from Thane?



(Testimony of Emil Gastonguay.)

A. Well, the beach line is nineteen miles, or eighteen and a fraction miles.

Q. Now, where do your duties take you? Where do you go?

A. All over the system, where power is used, generated or used.

Q. Where is power generated? [253]

A. Power is generated at Salmon Creek and Annex Creek.

Q. And used where—at the mine?

A. Used at the mine and the mill.

Q. Now, Mr. Gastonguay, did you, during the period you were employed—you are still employed by the Alaska-Gastineau? A. I am.

Q. During the period you were employed there, have you kept any weather records?

A. Yes; we kept precipitation data.

Q. Where?

A. Temperature and precipitation. At Salmon Creek, Thane, Perseverance and Annex Creek, and they were kept for a while at Carlson Creek, but that was discontinued.

Q. Over what period did you keep precipitation data at Perseverance?

A. That was kept from 19—started in 1914 and kept until the mine was closed down.

Q. Have you a record of the precipitation there.—daily precipitation at Perseverance?

A. Yes, I have the record which I copied for you.

Q. What was the greatest amount— I might

(Testimony of Emil Gastonguay.)

ask you, have you a record of the precipitation or rainfall at Perseverance on September 26, 1918?

A. Yes; that was the—

Mr. COBB.—(Interrupting.) Well, that's an answer to the question.

Q. What was that precipitation?

Mr. COBB.—I think I shall object to that. The period of time—only four years—is too short for purposes of comparison or showing that this was an unusual rainfall; or that it [254] was the act of God, as they claim.

The COURT.—Objection overruled. The testimony on this point might not be limited to the testimony of this witness; there might be other records kept during a longer length of time.

Mr. COBB.—Well, it will be admitted then, subject to being stricken.

Q. What was the precipitation at Perseverance on September 26, 1918? A. 7.4 inches.

Q. 7.4 inches? A. Yes, sir.

Q. And you say that was four miles from Ju-neau? A. Yes, sir.

Q. At the head of Gold Creek? A. Yes, sir.

Q. Now, Mr. Gastonguay, what is the highest record—what is the highest precipitation or rainfall during any other twenty-four hour period, within your records at Perseverance?

A. Well, this was the highest.

Q. I mean the next highest?

A. The next highest was in that same year; that same year, 3.4 in May, May 28.

(Testimony of Emil Gastonguay.)

Q. What year? A. That's 1918.

Q. Three and what did you say? A. 3.4.

Q. What was the next highest before that?

A. Well, there are several that run close to that.

There's [255] 2.6—two of those; 2.65, 2.71—

Q. What did you say that one was in May, 1918? I didn't get that exact.

A. May, 1918, was 3.4.

Q. 3.4. Those other high periods that you mentioned, in what years were those?

A. Well, there's 1916, 1917 and 1918.

Q. You covered the whole period? A. Yes.

Q. Covered the high points of the whole period?

A. Yes.

#### Cross-examination.

(By Mr. COBB.)

Q. No particularly high water in 1915? What does your record show as the highest in 1915?

Mr. FAULKNER.—There is one other question I want to ask you. Mr. Gastonguay, where were you on September 26, 1918? Where were you yourself. A. On September 26?

Q. Yes.

A. I was at Thane in the morning and then came to Juneau, went—crossed Gold Creek, went to our switching tower and then went out to Salmon Creek about noon and was out there until late that evening.

Q. Did you observe the waters of Salmon Creek

(Testimony of Emil Gastonguay.)

that day? A. Yes; made a record at Salmon Creek.

Q. Did you personally observe it?

A. No; not personally.

Q. I mean, on the way out, you saw it, didn't you? A. Yes. [256]

Q. Now, you have seen it before?

A. Oh, yes; I have seen it whenever we had any trouble there.

Q. Did you ever see the water as high as it was on that day? A. No.

Mr. COBB.—We object to that as irrelevant and immaterial; too short a period of time. The testimony shows that during this period there was no particularly high water.

The COURT.—Objection overruled.

Q. Now, Mr. Gastonguay, on September 26, 1918, did you observe any destruction caused by the rainfall or the flood in Gold Creek, or in Salmon Creek? A. Yes; at both places.

Q. Now, I will ask you, first, what was done at Salmon Creek?

A. Well, at Salmon Creek, we had a washout from one of the side forks, which took out a dam which impounded a forebay close to No. 2 power house, and washed out the flume in two places and took out the track, the tramway in two places.

Q. Did you have any other trouble anywhere else from slides or washouts that day?

A. Yes, we had trouble with our lines, too, and we had a washout at Thane.



(Testimony of Emil Gastonguay.)

Q. Did you observe any slides or washouts between Juneau and Salmon Creek?

A. Yes; there were several of them.

Q. Now, how did the damage done that day compare with anything else that you have ever experienced?

A. Well, there was considerably more on that day. It was practically universal around here, over the system. [257]

Q. The damage?      A. Yes.

Cross-examination.

(By Mr. COBB.)

Q. Whole town was wiped out?

A. Beg pardon?

Q. Whole town was wiped out?

A. Whole town?

Q. You said it was universal—the destruction around here was universal, as I understood you.

A. No; the damage.

Q. Oh. The whole town damaged?

A. Not that I know of. There was considerable damage in town, though.

Q. It wasn't universal then?      A. Well, no.

Q. In this region of the country around here—Gold Creek, Salmon Creek, Thane—it's nothing uncommon to have more or less trouble with high water in flumes, is it, or slides or washouts?

A. Well, it's not a regular occurrence.

Q. No; it isn't regular, but it's not uncommon, is it?

(Testimony of Emil Gastonguay.)

A. Well, that all depends on what you call uncommon.

Q. Well, don't you have a great deal of trouble at every period of high water, with some one of the flumes, or something or another, connected with your mining operations?

A. Not, at every period; no.

Q. How is that?

A. Not at every period; no.

Q. Is that the only time you ever had any trouble?

[258] A. No; it is not.

Q. Great number of times? A. Yes.

Q. In other words, the region back of Juneau which feeds these streams is exceedingly precipitous? A. Yes.

Q. Very rapid run-off? A. Yes.

Q. In a few hours a heavy rain will run right off and cause high water in the streams, won't it?

A. Well, no exceedingly high water in a few hours that I have ever noticed.

Q. That you have ever noticed. Well, have you ever observed that at times when there is snow up back near the heads of these streams, in the fall of the year, whether or not when the snow is carried off by the rain— A. (Interposing.) Yes.

Q. (Continuing.) that it would increase the height of water in the streams? A. Yes.

Q. So that the height of water might not depend altogether upon the amount of rain?

A. Not altogether; no.

Mr. COBB.—That's all.

**Testimony of George Oswell, for Defendants.**

GEORGE OSWELL, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth; the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.) [259]

Q. Will you please state your name?

A. George Oswell.

Q. Where do you live?      A. At the Ebner mine.

Q. Where is the Ebner mine?

A. About a mile and a half up Gold Creek.

Q. From Juneau?      A. Yes.

Q. How long have you lived there?

A. Since January, 1914.

Q. What is your business?

A. Mine superintendent.

Q. Where is your residence situated with reference to Gold Creek?

A. My residence is right at the mine within two or three hundred feet of Gold Creek.

Q. Were you at the mine and at your residence on September 26, 1918?      A. I was.

Q. Did you observe the rainfall and the water in the creek on that day?      A. I did.

Q. Did you observe any damage that was done on the creek that day?      A. Yes, sir.

Q. When did you first observe the period of high water that morning?

A. As soon as I got out in the morning.

(Testimony of George Oswell.)

Q. What time would that be?

A. Oh, about six o'clock; six-thirty.

Q. What was the condition of the creek at that time? [260]     A. It was high.

Q. What did you do after that?

A. Well, I didn't do much until the men came on to go to work at seven o'clock; and the blacksmith who lives in town, coming up to work that morning, reported that there was danger of the Gold Creek flume going out; that the concrete flume would not carry the water or the flow of the creek at that time.

Q. You mean the flume of the water company?

A. Yes.

Q. How far is that from your property?

A. Oh; it's about halfway between Juneau and the property.

Q. Now, did you come down there that morning?

A. I did.

Q. What did you—

A. (Interrupting.) About eight-thirty.

Q. What did you observe down there at that flume at that time?

A. Well, I observed that the flow of the creek was larger than the flume would carry, and it was spilling over.

Q. What was the construction of that flume? What was inside of it?

A. Why there was timber lining inside of the concrete walls.

Q. What was on top of it?



(Testimony of George Oswell.)

A. Nothing but girders or beams across, you know—spreaders for the timber lining.

Q. There was timber beams across?

A. Yes; about eight by eight, six by eight, or some such size.

Q. How were they fastened?

A. They were anchored by cables. [261]

Q. How long is that flume, Mr. Oswell, do you know? A. Approximately 240 to 50 feet.

Q. And about the width?

A. About 16 by 18 feet wide.

Q. How deep?

A. At the lower end the walls are about six feet, I would judge, and the upper end probably ten feet.

Q. Now, where did you go from there, Mr. Oswell? A. I returned to the mine.

Q. Did you come back down to the flume or down toward town again that day?

A. I was down at the flume again along after lunch.

Q. What did you observe then?

A. A similar condition.

Q. Water higher or lower?

A. Just about the same spilling over.

Q. And was anything coming down?

A. Timbers.

Q. Anything else? A. Stumps, timbers.

Q. Now, then, did you come down again that day?

(Testimony of George Oswell.)

A. Yes, I was down later in the evening, about four or five or four-thirty.

Q. What did you observe with reference to the flood then, when you came down in the evening?

A. The water had diminished some and the timber lining of the concrete flume had gone out.

Q. Did you observe any other signs of destruction or washouts on the road between your place and there?

A. Yes, the old bridge that was alongside the present bridge [262] on Gold Creek had gone out.

Q. And did you observe anything with reference to the road—any damage to the road?

A. Down near the town the roadway was gone out for a length of about ninety feet long.

Q. Above that did you observe any signs of damage at that time or later?

A. The Ebner flume and two bridges—the Ebner dam and two bridges along above the Ebner dam, had gone out; also there were gaps in the Ebner flume.

Q. Did you observe the road in the vicinity of what is called the Red Mill, in the basin?

A. Yes.

Q. What happened there?

A. Oh, the road was washed out entirely—the map of the whole creek changed.

Q. Where did the creek change? In what respect did it change?

A. Oh, it formed a new channel further to the northeast.

(Testimony of George Oswell.)

Q. And did you come down to town that day?

A. I did. I came down that night about nine o'clock.

Q. Came down town about nine o'clock?

A. Yes, sir.

Q. What was the condition here in town that night?

A. The town was in darkness. There was no lights here in town that night.

Q. Now, how long have you been at the Ebner Mine? A. Since January, 1914.

Q. Have you observed conditions on the creek during that period? A. Yes, sir.

Q. Did you ever see the water so high? [263]

A. Never before or since.

Q. Did you ever experience as great a rainfall as there was on September 26th?

A. No, sir; according to the records, there had never been so great a rainfall.

Mr. COBB.—We object to that and ask to have the answer stricken out as hearsay.

Q. From your observation, Mr. Oswell?

A. Never saw a larger rainfall.

Cross-examination.

(Mr. COBB.)

Q. You only had four years' observation?

A. Huh?

Q. I say, you only had four years' observation?

A. Yes; I have had nine, now.

Q. Nine now? A. Yes.

(Testimony of George Oswell.)

Q. And there hadn't been any since that—you wouldn't undertake to say that within the last twenty-three years there hadn't been periods of water as high?     A. I can't go beyond 1914.

Q. This flume that you speak of, up in the basin, Mr. Oswell—     A. Yes.

Q. The flume didn't go out itself—just the lining?

A. The concrete flume, no, is there to-day.

Q. Is there to-day. And this little bridge that you speak of that had been practically abandoned because its abutments were undermined, and a new bridge built?

A. Yes, there has been a new bridge built.  
[264]

Q. And this flood simply completed the work of undermining the abutments of the old bridge?

A. It wasn't undermined.

Q. How's that?     A. It wasn't undermined.

Q. Hadn't it been abandoned because it was being undermined?

A. It was used right along, more or less, that old bridge—wasn't undermined. The cribbing is there to-day.

Q. But because of its condition a new bridge had been built?     A. Yes.

Q. Hadn't it.     A. Yes.

Q. Before this flood?     A. Yes.

Q. That new bridge didn't go out, did it?

A. No.

Q. You say that when you got down here that the town was in darkness?     A. It was.



(Testimony of George Oswell.)

Q. How long did that remain in that condition?

A. I don't know.

Q. How long did you stay in town?

A. I was in overnight. I came in for safety that night.

Q. Now, Mr. Oswell, it's no uncommon thing to have slides up in the basin and injure the roads up there, is it?     A. We have slides occasionally; yes.

Q. Have them most every time there is a considerable rainfall, don't you?

A. Oh, yes; we have had them.

Q. Yes. [265]

A. Several times.

Q. The roadway you speak of about going out up there, wasn't carried out by Gold Creek?

A. What is that?

Q. The roadway you speak about going out about ninety feet, that was taken out by a slide off the mountainside, wasn't it?     A. Yes.

Q. And not the waters of Gold Creek?

A. Yes.

Q. You say it was?

A. Not by Gold Creek—no, no—by a slide.

Q. By a slide.     A. Yes.

### **Testimony of George Dull, for Defendants.**

GEORGE DULL, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of George Dull.)

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name, please?

A. George Dull—R. Dull.

Q. Where do you live?

A. George R. Dull.

Q. Where?     A. George R. Dull.

Q. I say, where do you live, Mr. Dull?

A. Juneau.

Q. How long have you lived in Juneau?

A. Over twenty-five years. [266]

Q. What is your occupation?

A. I'm looking after the water system.

Q. In charge of the water—

A. (Interrupting.) Yes; for the city.

Q. Before that, what were you doing? How long have you been in charge of the water system?

A. Over six years.

Q. Before that what were you doing?

A. Carpentering and mining.

Q. Did you mine in Jualpa basin?

A. Yes, sir.

Q. Where is Jualpa basin?

A. Right up outside the city, going up the basin, going up to—

The COURT.—(Interrupting.) What creek?

The WITNESS.—Gold Creek.

Q. Does Gold Creek flow through it?     A. Yes.

Q. Gold Creek flows through it.

A. Uh-huh.

(Testimony of George Dull.)

Q. What kind of mining did you do there?

A. Drove a tunnel.

Q. What kind of mining was it you were doing there—placer mining or—

A. Placer mining; yes.

Q. Did you have a flume there at any time?

A. Yes; there was a big flume built up there.

Q. When was that built?

A. I don't remember the year.

Q. About how long ago, Mr. Dull, if you know?  
[267]

A. About—maybe about eighteen, nineteen years ago, I think.

Q. Now, did the water company have a flume up there?     A. Yes, sir.

Q. Where was that?

A. Right this side of the basin.

Q. Up Gold Creek?     A. Yes, sir.

Q. What was that built for?

A. To carry the water across the springs.

Q. Waters of Gold Creek?     A. Yes.

Q. And the springs is where you get your water supply from?     A. For the city; yes.

Q. For the city.     A. Uh-huh.

Q. Were you up in the basin, on the banks of Gold Creek on the 26th of September, 1918?

A. Yes, sir; I was.

Q. What did— What time did you go up there?

A. Oh, about half-past eight or nine o'clock, around there.

(Testimony of George Dull.)

Q. In the morning? A. Yes.

Q. Did you have any trouble that day with the waters, flood conditions? A. Yes.

Q. What happened?

A. Oh, our flumes went out in the basin.

Q. Did the big flume that you speak of, go out?

A. No; the big flume didn't go out.

Q. Well, I mean the lining of it. [268]

A. Small flumes went out.

Q. Well, the timber lining of the big concrete flume, I mean.

A. The lining went out of the big concrete flume; yes.

Q. What about your small flume?

A. The big pipe-line to the reservoir went out.

Q. Did that go out? A. Yes, sir.

Q. Did anything happen to the road between here and your property out there?

A. Well, there was a slide.

Q. Did the road slide off? A. Yes.

Q. About how far?

A. Oh, maybe a hundred feet, I don't know. I never measured it.

Q. What caused it? What caused the road to slide? A. Landslide came down the hillside.

Q. Do you know what caused that?

A. Well, I suppose the rain.

Q. What other damage was done in there that day?

A. Took the low-pressure bridge out across the creek.

(Testimony of George Dull.)

Q. Did you see the waters of the creek that day?

A. Yes.

Q. What did you see in them, if anything, come down the creek?    A. Oh, lots of timber.

Q. Stumps?    A. Yes.

Q. Mr. Dull, I will ask you if, in your experience of twenty-five years, you have been acquainted with that basin and Gold Creek in all that time?

A. I have been up there often; yes. [269]

Q. Did you ever live up there? Did you ever live in the basin?

A. No; I never lived there.

Q. Where do you live now?

A. I live right this side on the basin road.

Q. On the basin road.

A. Where the big reservoir is.

Q. Did you ever see as high water in Gold Creek as there was that day?    A. No, sir; I did not.

Q. Did you ever see as great a rainfall as there was here that day at any time within your memory?

A. I don't believe I did; no.

Q. Mr. Dull, you live almost in sight of Gold Creek?    A. Yes.

Q. And your duties take you up there every day, do they?

A. Well, I don't go up there every day.

Q. Not every day, but your duties are connected with the flow of water up there, are they?

A. Yes, sir.

Q. And in your mining did you observe the creek at that time, in your placer mining?



(Testimony of George Dull.)

A. Well, one summer I worked up there in the basin.

Q. Your father was engaged in mining up there, wasn't he?

A. Yes; he worked up there, too.

Cross-examination.

(By Mr. COBB.)

Q. Prior to the time that you became connected with the water works, six years ago—that would be 1917 or 1916— When did you first begin to be connected with them, did you say—six years ago? [270]

A. Six years ago on the first of September last.

Q. That was in 1917.

A. Yes. 1916, ain't it?

Q. Or sixteen, I should say. Now, prior to that time, you didn't have any particular occasion to observe the high water in Gold Creek all the time?

A. Well, while I was running the tunnel for the Last Chance Gold Mining Company, I worked right down at the creek.

Q. When you were running the tunnel for the Jualpa Gold Mining Company? A. Yes.

Q. What year was that? A. What?

Q. What year was that?

A. That was in the fall of '98, '99, 1900.

Q. Those three years A. Yes.

Q. Now, outside of those three years and the six years that you have been connected with the water company, you have never had any particular oc-

(Testimony of George Dull.)

casion to watch the creek to see how high it was?

A. For four years then I was working for Lewis.

Q. How is that?

A. For four years, then, I was working for Lewis.

Q. For four years then?

A. Then, too; yes, sir.

Q. Well, outside of that, did you ever have any—

A. (Interrupting.) No.

Q. (Continuing.) Particular occasion to observe the height of the water? [271] A. No.

Q. You wouldn't undertake to tell the jury that it might not have been as high since you have been here and you did not observe it, would you?

A. No; I don't think it was; I don't think it was as high any time since—

Q. (Interrupting.) You don't think it was, but you don't know. Do you know it wasn't?

A. Yes, I know it wasn't.

Q. Were you here in 1913? A. Yes, sir.

Q. Where were you in that year during the period of high water?

A. There wasn't none so very high then.

Q. How is that?

A. There wasn't none so very high then.

Q. Well, where were you? A. I was here.

Q. Whereabouts? Did you go up the creek?

A. No, I was right here in Juneau.

Q. In Juneau? A. Yes.

Q. Did you go out to the creek during the high

(Testimony of George Dull.)

water that day? A. Well, I live right up there.

Q. How is that?

A. I live right near the creek.

Q. Do you know whether you were here or not?

A. I was home all the time here.

Q. Don't recall that high water in 1913 at all? A. No, not in particular.

Q. So, when you said that the 1918 flood was the highest, you [272] *you* didn't recall the flood of 1913 at all? A. No, only 1903.

Q. 1903—

A. (Interrupting.) And 1918 was the two highest waters we had since I came to Juneau.

Q. Since you recall? A. Yes, sir.

Q. In your mind, however, you didn't recall the flood of 1913 at all and don't recall it now, do you?

A. No, I don't remember seeing any real high water then.

### **Testimony of John Reck, for Defendants.**

JOHN RECK, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Reck, will you please state your name?

A. John Reck.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

(Testimony of John Reck.)

A. Twenty-four years

Q. What are you doing now?

A. President of the First National.

Q. How long have you been President of the First National Bank?     A. Since 1915.

Q. And prior to that time what was your business?     A. Meat market.

Q. Which meat market?

A. Alaska Meat Company. [273]

Q. How long were you connected with them?

A. The Alaska Meat Company, I have been connected with them since 1900.

Q. During the period from 1900 to 1915, did the Alaska Meat Company have any structure on Gold Creek?

A. They did have a slaughter-house on Gold Creek.

Q. Had what?     A. Slaughter-house.

Q. Where was that?

A. Right down on the flat, right over where Mr. Saum lives now; right in that neighborhood.

Q. Below the Gold Creek bridge that goes to the cemetery?     A. Several hundred feet below.

Q. Several hundred feet below?     A. Yes.

Q. Did you have occasion to go to that place frequently?     A. Oh, yes; lots of times.

Q. Were you in a position to observe the waters of Gold Creek during that period?     A. Yes, sir.

Q. 1900 to 1918. And did you see the waters of Gold Creek on September 26, 1918?

A. I did.

(Testimony of John Reck.)

Q. Did you see the flood conditions that day?

A. Yes, sir.

Q. I will ask you if, within your experience of 24 years, you have ever seen as great a flood in the stream as there was that day?

A. No, sir.

Q. And you observed the rainfall on that day?  
[274]

A. Well, I naturally did. I was superintendent of the waterworks at the time, and am still, and I did observe the creek that day.

Q. How long have you been connected with the waterworks?     A. Since 1915.

Q. Since 1915. And have you ever seen as great a rainfall within your residence in Juneau as there was on September 26, 1918?     A. No, sir.

Q. Did you observe the damage that was done in 1918, September 26, on what is known as the basin road, that bank of Gold Creek?     A. I did.

Q. What occurred there?

A. About eight o'clock in the morning Mr. Os-  
well called me by phone. He says, "You better go  
up the basin; your flume is going out—"

Mr. COBB.—I think I shall object to that. He  
has proved that the lining went out—if that's all  
you want to prove.

Mr. FAULKNER.—No; I'm asking about the  
road.

Mr. COBB.—I shall object to any more evidence  
on that. It has been proved that a lot of slides



(Testimony of John Reck.)

came down the mountains. I think that has been sufficiently proved.

The COURT.—You practically admit that there was?

Mr. COBB.—That there was slides came down?

The COURT.—Yes.

Mr. COBB.—Yes.

Mr. FAULKNER.—Is it admitted that they were the greatest slides that had ever occurred?

Mr. COBB.—Why, no; there was one slide that came down a [275] a number of years ago that was bigger than any slide that ever occurred up there.

The COURT.—You want to prove that that was the greatest slide that ever occurred?

Mr. FAULKNER.—No.

The COURT.—You simply want to prove that there were slides up there?

Mr. FAULKNER.—Oh, yes. I want to show that nothing had occurred—

The COURT.—Yes.

Q. Did you observe the damage done on the road that day? A. I did.

Q. Did you go up there that day?

A. I went up about nine o'clock.

Q. What was the condition of the road?

A. The condition of the road at that time was all right, but the flume was overflowing and the timber commenced to gather at the upper end; that is, the timbers across the flume. I could see that there was no chance of doing anything; so I came back,

(Testimony of John Reck.)

back down. Later in the day I went up again, in the afternoon, when the slide had occurred, and the road and the flume had gone out. There was a slide on the other side came down and took the electric light company's flume out, piled it up against our cement flume. I went up there to see if we could do anything, but there was no chance. Our water main was gone, too; so there was no use of going any further.

Q. Water main was broken in two?      A. Yes.

Q. Shut off the supply of water in Juneau?  
[276]      A. Yes, sir.

Q. What was the condition of the road?

A. Well, I had to go over about 150 feet or so on the hillside. There was no road at all and I had to go out on the bank.

Q. There was no road at all?      A. No.

Q. Had you been up Gold Creek frequently before that?      A. Yes.

Q. Up that road?      A. Yes.

Q. Had you ever seen such damage done there before?      A. No, sir.

Cross-examination.

(By Mr. COBB.)

Q. Do you recall the big slide that occurred there some years ago, that covered up the road for three or four hundred feet?

A. I remember that a lot of— That was farther up.

Q. How is that?

A. That was farther up. I remember that well.

(Testimony of John Reck.)

Q. Wasn't that a bigger slide than anything that occurred in September, 1918?

A. It was a bigger slide; bigger body of ground came down.

Q. Yes.

A. But this time, there was slides both ways. There was one came the other side and took the largest flume out and also took the concrete flume out and another one came this way and took the road out.

Q. Slides up in that basin, everywhere along there, are very common, aren't they? [277]

A. They have been occasionally; yes. That's not the first time.

Q. How's that?

A. That's not the first time that they had a slide.

Q. And that wasn't the last time, either. There have been slides since then.

Mr. FAULKNER.—Oh, just a minute. We object to any questions as to what happened since then.

Mr. COBB.—That shows the character of the country.

The COURT.—Yes; objection overruled.

Q. They have occurred since, haven't they?

A. Small ones.

Q. Is that the only time that your watermain up there was broken by a slide? A. Yes, sir.

Q. That was the only time—

A. (Interrupting.) Yes.

Q. Since you have been connected with it?

(Testimony of John Reck.)

A. Yes, sir.

Q. You don't know but that it may have been broken before?

A. It's never been broken since I have been in the country.

Q. How is that?

A. We always had water since I have been in town.

Q. Don't you know that your watermain up there has been broken by slides several times and had to be replaced?

A. You're wrong, because the flumes used to be along on the top there and the water used to get dirty and Mr. Bishop put them under; buried them. That was only a few years before I took charge.

Q. That flume was broken by a slide and not by the water?

A. No, by the waters of the creek. [278]

Q. Where did that occur?

A. About, I should say, a thousand feet below the flume—

Q. Below the flume?

A. Just at that bend, where the road bends around this way, and there is a hole in here (indicating), and the bottom end lays right out at the bottom of the creek there.

Q. You don't know whether that wasn't caused by something getting in there and making a swirl?

A. No; it was washed out.

Q. Washed out?      A. Yes.

Q. Now, Mr. Reck, prior to the time that you

(Testimony of John Reck.)

were connected with the waterworks, did you have any particular occasion to notice the height of the water in Gold Creek?

A. I used to go to the slaughter-house.

Q. How is that?

A. I used to go to the slaughter-house. We used to get some high water out there.

Q. At your slaughter-house? A. Yes.

Q. That sat right immediately on the banks of the creek? A. Yes, sir.

Q. So that you could throw—

A. (Interposing.) Yes.

Q. (Continuing.) The waste from it right out into the creek? A. Yes.

Q. And high water would naturally—

A. (Interposing.) Would notice it.

Q. (Continuing.) Be right up to the house. It was only a few feet above the level of the creek?  
[279] A. Yes, yes.

Q. Now, prior to that time there were no buildings down on the flats?

A. No; there was nothing down there excepting the dairy barn.

Q. Nothing to produce any alarm over high water other than that it might injure the corner of your barn.

A. There was another barn a little farther up. The Frye-Bruhn barn was just a little farther up.

Q. Do you recall now all the high water, the various periods of high water that you have seen in Gold Creek? A. No, I couldn't.



(Testimony of John Reck.)

Q. You couldn't?

A. That would be impossible.

Q. So that you mean to tell the jury that so far as your recollection goes and impressions made upon you, you think that the September, 1918, flood was the highest water there was?

A. Highest water I ever saw in Juneau.

Q. You wouldn't undertake to say that it was the highest water since you have been here?

A. Yes, sir; I'm positive of that, because I went down to other floods just to see them.

Q. Have you been in Juneau constantly for twenty-four years?

A. Yes; with the exception of a week or two that I might go to Seattle and come right back.

Q. Do you recall the exact dates that you were gone to Seattle?      A. No, sir.

Q. Do you know whether there was any high water here when you were down there or not?

A. I don't know.

Q. You don't know? [280]      A. Yes.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Reck, did you ever observe any damage done when you returned from Seattle?

A. No, sir.

**Testimony of B. M. Behrends, for Defendants.**

B. M. BEHREND, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Behrends, will you state your name?

A. B. M. Behrends, Juneau, Alaska.

Q. How long have you lived in Juneau?

A. Since 1887.

Q. What business are you engaged in?

A. Merchandising, banking.

Q. Merchandising and banking. Were you in Juneau on September 26, 1918?     A. I was.

Q. Did you observe the flood conditions on that day?     A. Yes.

Q. At Gold Creek. Were you out on Gold Creek that day?     A. Yes.

Q. In the Casey-Shattuck flats?     A. Yes.

Q. Did you observe the damage done there?

A. Yes. [281]

Q. Were you there after the waters subsided?

A. Yes, sir.

Q. The next day?

A. Yes, I was there the next day.

Q. Did you go over the ground out there?

A. Yes.

Q. Did you observe any other damage done on that day in Juneau?     A. Yes.

(Testimony of B. M. Behrends.)

Q. Where was that?

A. On Gastineau Heights.

Q. What was done there?

A. The Williamson cottage and Walter Bathe cottage and the Gillen cabin smashed down.

Q. Washed out?      A. Washed down.

Q. Did you observe any damage done to the Gastineau Hotel?      A. Yes.

Q. What was done there?

A. Well, the Bathe house, I think, was thrown against the Gastineau Hotel which caused the flood in the hotel; water coming out of the front door.

Q. Water came through the hotel and out the front door?

A. Water ran through the Gastineau Hotel and out into the street.

Q. Did you also go over that section of the town after the flood?      A. Yes.

Q. The next day or two?      A. Yes.

Q. Now, I will ask you if, within your residence in Juneau you have seen as high water in Gold Creek as there was on that [282] day?

A. I have not.

Q. Have you observed Gold Creek at periods of high water before this flood?

A. Yes, I think I have.

Q. Did you ever see as much destruction or damage caused by the high water before, or rainfall?      A. No.

Q. Now, Mr. Behrends, how long had those

(Testimony of B. M. Behrends.)

houses that you speak of, been on Gastineau Heights or Swede Hill?

A. Well, the Bathe house, I presume, hadn't been there more than—

Mr. COBB.—(Interrupting.) Speak a little louder.

The WITNESS.—I presume the Bathe house hadn't been there more than five or six years, and Williamson's house, I understood, had been there for a long time, as long as I can remember almost, and the Gillen house had been there a long time.

Q. How about the other house? Did you know Mr. Caro's house? A. Yes.

Q. How long had that been there?

A. That has been there a long time.

Q. Twenty years?

A. Yes; I would say it had been there that long.

Q. Now, Mr. Behrends, had you ever seen slides before that day in Juneau?

A. On that particular day, before?

Q. No; any time before that, in your memory?

A. Yes.

Q. Did you see anything as great as the slides and waterfall [283] on that day? A. No.

Q. Did you see as great a rainfall as there was on that day? A. No.

Cross-examination.

(By Mr. COBB.)

Q. Have you seen slides come down on Swede Hill and Gastineau Heights, as it is sometimes called, in which houses smashed down before?

(Testimony of B. M. Behrends.)

A. Yes.

Q. That is a very steep hillside, mountainside, isn't it?     A. Yes.

Q. And it is essentially subject to slides?

A. It is.

Q. Isn't it?     A. It is; sure.

Q. You say you are a merchant and banker. Prior to the time that the flats were built over, after 1913, that is, the Casey-Shattuck Addition, what was there to occasion your going out to see the height of water in the creek, if anything?

A. You mean on that particular day?

Q. How's that?

A. You mean on that particular day or before that?

A. No; any time before that, before these houses were built out on the Casey-Shattuck flats, there wasn't any building around there that would be likely to be injured by high water in Gold Creek?

A. No; we used to go out there for walks—Mrs. Behrends and I. [284]

Q. Would you take your walks out in a heavy rain?     A. Yes; quite often.

Q. At a time of high water and flood?

A. Yes, we would take walks out there; yes, indeed.

Q. Did you know every time that there was high water?     A. Not every time.

Q. What I am getting is, what was there to make it of any particular interest to you to go out and



(Testimony of B. M. Behrends.)

look at the creek and observe the height of the water, prior to 1918?     A. There was none.

Q. Nothing at all?     A. No.

Q. That day there was a particular reason for your going out there?

A. Yes, it was extraordinary; that is why we went out there.

Q. Now, do you recall all the high waters since you have been in Juneau?

A. I wouldn't like to say that I seen them all.

Q. How's that?

A. I wouldn't like to say that I seen them all.

Q. You wouldn't say that you saw them all. There may have been some very high water here that you didn't go out to the creek to see at all?

A. Might be.

Q. How is that?     A. Might be.

Q. Did you see the creek during the high water of 1913?     A. I don't remember.

Q. You don't remember that at all.

A. No, sir. [285]

Q. Do you remember it in 1903?

A. No; I do not.

Q. Then, what you mean to tell the jury is that so far as your observation goes, in your opinion 1918 was the highest water we have had?

A. Yes.

**Testimony of Melvin B. Summers, for Defendants.**

MELVIN B. SUMMERS, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Summers, will you state your name, please?     A. Melvin B. Summers.

Q. Where do you live, Mr. Summers?

A. Juneau.

Q. How long have you lived here?

A. Little over six years.

Q. What business are you engaged in?

A. I'm in charge of the Weather Bureau in Alaska.

Q. Have you the records of rainfall in Juneau?

A. Yes. We have the daily records, beginning with 1912—I have forgotten the month—and we have tabulated records of monthly values prior to that.

Q. How long?

A. As far back as the records go.

Q. That's only monthly values?     A. Yes.

Q. You have the dailies?

A. We have a few dailies, or rather intermittent records. The [286] continuous record dates from some time in 1912. I think it is July.

Q. You have a continuous daily record?

A. A continuous daily record.

(Testimony of Melvin B. Summers.)

Q. What do those few daily records that you have prior to that time consist of—periods of heavy rain, or what?

A. They give the daily precipitation.

Q. But you say they are not complete?

A. They are not complete for certain years. There are a few years that they are complete.

Q. Have you the record— Were you in Juneau on September 26, 1918? A. Yes, sir.

Q. Have you the record of the rain in Juneau on that day? A. Yes.

Q. For what period? What was it, Mr. Summers, for a twenty-four hour period?

A. The greatest amount in twenty-four consecutive hours was 5.54 inches, from 5:34 P. M. the 25th to 5:34 P. M. the 26th.

Q. What is the next highest twenty-four period that you have in your records prior to that time?

A. There is a record of four inches in September, 1902 and three and a half inches in October, 1913.

Q. That was the highest, was it? A. Yes.

Q. Mr. Summers, did Mr. Sharick keep some records prior to your records? A. Yes.

Q. And those were kept under the supervision of the Weather Bureau? [287]

A. In a measure, Mr. Faulkner. The Weather Bureau, however, hasn't made very much use of his precipitation records. It was rather fragmentary and it was evident from the record that he didn't measure his precipitation daily. The Bureau has made use of his monthly totals of precipitation,

(Testimony of Melvin B. Summers.)

but we haven't made much use of the daily amounts because it is evident he didn't measure daily.

Q. He was what you call a volunteer observer?

A. Yes; he was; but there was never any one here to improve his work, or give him any instruction.

Q. You had no official here prior to that time?

A. No; there was no one here prior to January 1, 1917, or September, 1916, when I came here.

Q. That was when you came here?     A. Yes.

Q. Now, from 1912 to 1916, till you came here, who kept the records?

A. Kept on the Governor's lot—

Q. I mean—

A. (Continuing.) Apparently by officials of the Governor's office. C. R. Reid signed the report for July, 1912.

Q. Kept by the Governor's office?     A. Yes.

Q. And before that time they were kept only by volunteer observers?

A. Yes; well, the Governor's office was a volunteer observer, so far as that is concerned. It had no official connection with the Bureau, except that the Bureau furnished the equipment; furnished thermometers, and so forth. [288]

Cross-examination.

(By Mr. COBB.)

Q. You wouldn't say that those records kept before your coming here were correct, would you?

(Testimony of Melvin B. Summers.)

A. I think they are, so far as those that were made at the Governor's office are concerned.

Q. You wouldn't undertake to say positively that they were correctly recorded, would you?

A. The Weather Bureau has so considered them and the Bureau has accepted them as *bona fide* records.

Q. I am not asking you what the Bureau has done. Do you know?

The COURT.—Wait a minute. Are you asking him for his personal opinion?

Mr. COBB.—No; I'm asking for his personal knowledge.

Q. Do you know whether they are correctly recorded or not?

A. I think they are just as correctly recorded as any co-operative observers that have been authorized to keep co-operative records, with the exception of those that have been proved otherwise, as in the case of Mr. Sharick's.

Q. Personally, do you know that Mr. Sharick's records were always correctly recorded?

A. I do not; I don't think they were.

Q. You don't know of your own knowledge whether the other observers correctly recorded theirs? A. I think that these were.

Q. I didn't ask you what you thought. I know we all think probably they were, but do you know that they were?

A. I can only give you my opinion.

Q. But I am asking you for your knowledge.



(Testimony of Melvin B. Summers.)

You don't know that they were correctly recorded, do you? [289]

A. The Weather Bureau has accepted them—

Q. (Interrupting.) I'm not asking you what the Weather Bureau did. My question is a very plain one. Do you know that they were correctly kept?

A. I wasn't here to see them.

Q. How is that?

A. I wasn't here to oversee the work.

Q. You don't know anything about it except that you found them here when you came up.

A. I don't know that Mr. Folta's record is accurately kept. I assume that it is.

Q. Now, Mr. Summers, one or two other questions only. Juneau is at the mouth of Gold Creek.

A. Yes.

Q. The records kept here would not indicate the rainfall up in the basin, would they, except inferentially?

A. Only in general terms; yes.

Q. How is that? A. Only in general terms.

Q. Now, since you have been here with the Weather Bureau and observing other records kept, you know as a matter of fact, do you not, that very frequently there is very much higher rainfall up at the head of Gold Creek basin than there is in Juneau? A. Yes, that is generally the case.

Q. Generally the case?

A. Generally the case.

Q. And it is that rainfall that produces the high water in the creek? [290] A. Yes.

(Testimony of J. C. McBride.)

Q. The rainfall in Juneau doesn't go into Gold Creek at all?     A. No; no.

**Testimony of J. C. McBride, for Defendants.**

J. C. McBRIDE, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name.

A. J. C. McBride.

Q. Where do you live, Mr. McBride?

A. Juneau, Alaska.

Q. What office do you hold?

A. At present, I'm Collector of Customs.

Q. How long have you lived in Juneau?

A. Since 1894.

Q. 1894 or 1904?

Mr. COBB.—What year, Mr. McBride? I didn't catch it.     A. I have been here 18 years.

Q. 1904, then. Mr. McBride were you here on September 26, 1918?     A. Yes, sir.

Q. Where were you on that day?

A. Well, I was all over town that day. I was out on the flats, Casey-Shattuck flats; up on the hill here and over on this hill (pointing). I was helping at different places on account of the flood that day.

Q. Did you observe the flood conditions in Gold Creek?     A. Yes.

(Testimony of J. C. McBride.)

Q. Were you out there that day? [291]

A. Yes.

Q. At Gold Creek. Now, did you observe the flood conditions on what they call Swede Hill, or Gastineau Heights? A. Yes.

Q. And did you observe any flood conditions or conditions caused by the rainfall, on what is known as Chicken Ridge, up on the hill back of the court-house? A. Yes.

Q. What occurred up on Chicken Ridge that day—any slide up there that you know of? I mean up on what is called Chicken Ridge.

A. Well, that's where Garfield lives?

Q. Yes.

A. Well, I noticed that his house, the back part of his foundation had partly washed away, so much so that they took out the furniture that was in it—

Mr. COBB.—Well, I object to what somebody told him.

The WITNESS.—What is that? I didn't say somebody told me.

Mr. COBB.—Didn't you say that somebody told you?

The WITNESS.—No; I was there.

Q. Now, what occurred on Gastineau Heights?

A. Three or four houses slid out there.

Q. What caused them to slide? A. Water.

Q. How long had those houses been there, do you know? Were they there when you came here?

(Testimony of J. C. McBride.)

A. They were all there except the Bathe Apartments. The others were there except—

Q. The others were there since you came?

A. Yes. [292]      A. *Yes.*

Q. Did you observe any damage to the Gastineau Hotel?      A. Yes.

Q. What was the nature of that?

A. Water running through the hotel and coming through the corridor.

Q. Had you been out to the Casey-Shattuck flats since the flood of 1918?      A. Yes.

Q. And observed the damage done out there?

A. Yes.

Q. Have you ever been engaged in mining, Mr. McBride?      A. I have; yes.

Q. Prior to the time that you were appointed Collector of Customs, what business were you in?

A. I was in the mercantile business.

Q. In Juneau?      A. Yes.

Q. Had you observed periods of high water before in Gold Creek and vicinity?      A. Yes.

Q. How did the high water of September 26, 1918, compare with anything else you had seen prior to that time?

A. Largest we have had since I have been here.

Q. How is that?

A. It was the largest fall that we have had since I have been here.

Q. You say the largest rain?      A. Yes. [293]

Q. And the highest flood?

A. The highest flood.

(Testimony of J. C. McBride.)

Cross-examination.

(By Mr. COBB.)

Q. How many times have you seen high water up there, Mr. McBride?

A. Well, several times, Mr. Cobb.

Q. Well, about how many?

A. Oh, half a dozen times, probably.

Q. A half dozen times. You simply don't recall, in the eighteen years that you have been here, another period of water of high water as high as that? A. Not as high; no, sir.

Q. How is that? A. Not as high; no, sir.

Q. Did you see the creek during the period of high water during 1913?

A. I can't say that I did.

Q. In saying that it is the highest, then, you have no recollection of the 1913 flood?

A. Not in particular; no, sir. The only thing I'm using, probably as a basis for that is the bridge out at Gold Creek—

Q. (Interrupting.) How is that?

A. The bridge at Gold Creek never had gone out before to my knowledge.

Q. You don't know whether it was the high water, or the undermining of the abutments that carried it out?

A. This last time; the time that it went out?

Q. How is that?

A. The time that it went out? [294]



(Testimony of J. C. McBride.)

Q. Yes. A. I assume that it was high water.

Q. You just assume that? A. Yes.

Q. You don't mean to tell the jury that the water ever got as high as that bridge? A. Yes; it was—

Q. (Interrupting.) Did you see the bridge when it went out?

A. No; but I was there before it went out.

Q. You were there before it went out?

A. Yes.

Q. Was the water up to the bridge then?

A. Practically; that is, the stumps, timbers, and so on, coming down.

Q. I know what was coming down, but when you were out there, was the water as high as the bridge?

A. No, it wasn't; when I was out there, it was not.

Q. What hour was that?

A. Well, I was there along in the morning and along just after lunch.

Q. Just after lunch. Now, then, you have no recollection of the high water of 1913? A. No.

Q. Do you recall whether you were in town that day or not?

A. Well, I couldn't say that I was as a positive fact, on that particular day.

Q. You couldn't say. A. No.

Mr. COBB.—That's all. [295]

**Testimony of H. I. Lucas, for Defendants.**

H. I. LUCAS, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Lucas, will you state your name?

A. H. I. Lucas.

Q. Where do you live?      A. In Juneau.

Q. How long have you lived in Juneau?

A. Over ten years.

Q. Are you a member of the Fire Department?

A. Yes, sir.

Q. Were you in Juneau on September 26, 1918?

A. Yes, sir.

Q. Were you out at Gold Creek in the Casey-Shattuck flats on that day?      A. Yes, sir.

Q. When did you go there?      A. About noon.

Q. How did you come to go out there? What caused you to go out there?

A. The alarm of fire.

Q. You went out there with the Fire Department?

A. I was instructed to go out there with the Fire Department.

Q. When you went out you say it was about noon?      A. Yes.

Q. Where did you go when you first went out there?

(Testimony of H. I. Lucas.)

A. I went out past the Governor's house, down past the bridge, and over around to Mr. Casey's house on the other side of the creek. [296]

Q. That is across the Gold Creek bridge?

A. Yes.

Q. What did you observe when you crossed the bridge, with reference to waters in the creek? Were they high?

A. Yes, the water was very high at that time.

Q. How close to the bridge was it at that time?

A. Pretty close to the under-pinning of the bridge; in fact, the bridge was rather weak. I think I was probably the last man to cross it—one or two of us.

Q. Now, when you went across the bridge, what happened to the bridge after you went across?

A. Why, it gave way.

Q. Went out, did it?      A. Yes.

Q. Where did you go when you went across the bridge?

A. I went down past the Northern Laundry to Casey, Junior's house, Wm. Casey, Junior.

Q. Now, I will ask you to point out to the jury—just take a look at that photograph, Defendant's Exhibit No. 1—and ask you if you can just look at it and identify the place where you were?

A. Yes.

Q. Will you show to the jury over here where that place was?

A. This (indicating) is the house right here. That is William Casey, junior's house (pointing).

(Testimony of H. I. Lucas.)

Q. Now, will you show the jury, from that photograph, tell the jury what was the condition of the waters of the creek at that time?

A. Well, the waters of the creek at that time were away up around in here (indicating); right around this house and [297] running over there.

Q. Were you over in this area (indicating)?

A. Yes; over here by the laundry.

Q. Was the water flowing down there?

A. Down here?

Q. Yes.     A. Oh, yes.

Q. Where did it go with reference to Billy Casey's house?     A. All around that.

Q. Was it deep water there or shallow?

A. Well, I imagine around that house it was probably a foot deep, when we were packing out the furniture, and so forth, out of the house.

Q. What did you do while you were there?

A. We took the furniture out of the house, windows, sills, stove and everything that could be taken out. It was taken out of there and taken to his father's house.

Q. What was the condition around his father's house?

A. Water was going on through here and filled the basement of that house there. There was at least between two and three feet of water in the basement of Casey, senior's house that—well, I wouldn't say at that time, but an hour or two later.

Q. And the water was flowing over both banks, bulkheads. You remember where the bulkheads

(Testimony of H. I. Lucas.)

were—the bulkhead on the banks of the stream?

A. No, I don't remember where the bulkhead was.

Q. Well, do you remember the condition of the water? Was there water on both sides of the bulkhead? Could you see the bulkhead at that time? [298] A. No.

Q. Was the water in through here, where I am pointing, level? A. Yes.

Q. As high on one side as the other?

A. Yes; running through here.

Q. How long did you stay here?

A. I was there between four and five o'clock in the afternoon, I should judge.

Q. Where did you go from there?

A. Well, that was between William Casey, junior's house and William Casey, senior's house. From there I went back to the other side of the creek.

Q. Did you go down towards the bay?

A. I had to go around by Willoughby Avenue?

Q. The bridge was gone at that time?

A. Yes; the bridge was gone.

Q. Did you observe any water down there?

A. Oh, yes; everything was covered with water down there.

Q. Everything was covered? A. Yes, sure.

Q. Ever been called out there before with the Fire Department to assist in a flood?

A. Not in any flood; no.

Q. Did you ever see as great a flood?

Mr. COBB.—We object to that. The period for



(Testimony of H. I. Lucas.)

the purpose of comparison, is too short to be of any value.

Mr. FAULKNER.—It's of value for the period it covers.

The COURT.—Yes. Objection overruled.

Q. Within your residence in Juneau, have you ever seen as high a period of water? [299]

A. No; I don't believe I ever have.

Q. Did you observe any other damage that was done in any other part of town that day?

A. Yes; there was damage done back of the Gastineau Hotel.

Q. What happened up there?

A. Water came down the hill there and carried the Bathe Apartment up against the rear of the Gastineau Hotel, and took Billy Williamson's house out—

Q. Did what?

A. Bill Williamson's house, I say, had washed down hill into the Bathe Apartments.

Q. Do you know how long those houses had been there—any of them?

A. Well, the Bathe Apartments had been there, let's see—been there for four years, I should think.

Q. Now, the other houses, do you know anything about those?

A. They were there when I came to town.

Q. Did you observe any damage that day, or after the flood, up at Mr. Garfield's house?

A. Yes.

Q. What happened there?

(Testimony of H. I. Lucas.)

A. Why, the bank was washed away back of Garfield's house, down into the basin there.

Q. Where is Garfield's house?

A. Up at the head of Main.

Q. Is it near where you live?

A. Yes; right close to it.

Q. About how far from your house?

A. I should judge about two hundred, three hundred feet. [300]

Q. And did you see that bank that was washed away there? Did you see it after it was washed away? A. After it was washed away; yes.

Q. What was the condition of that house after the bank was washed away?

A. Well, the corner of it, I should say, the northwesterly corner, probably, was kind of hanging out there over the bank.

Q. That is, the dirt under that corner of the house had—

A. (Interposing.) Yes; the dirt had slid down.

Q. And into the creek? A. The creek or pond.

Q. Do you know whether that was a permanent bank or a filled-in bank? Could you tell from the appearance of it?

A. Why, I'm not exactly sure of that, myself. I wouldn't want to say just exactly whether it was or not.

Q. But you do say that the washed out area extended under the house? A. Yes.

Q. And you say that the house was hanging over?

(Testimony of H. I. Lucas.)

A. Yes; we took all the furniture out of the house for fear the house would go over the bank.

Cross-examination.

(By Mr. COBB.)

Q. How long have you been in Juneau, did you say? A. Little over ten years.

Q. You came here about 1912? A. 1912; yes.

Q. 1912. Where were you in 1913?

A. I was here. [301]

Q. Did you observe the high water that year?

A. No.

Q. Didn't go out to Gold Creek during the period of high water? A. Not in 1913; no.

Q. There were no houses on the flat, then, to be damaged by high water in the creek?

A. Not to my knowledge.

Q. It was all settled there since.

A. There was a slaughter-house down there on Gold Creek. That is the only one I can remember.

Q. Now, you stated a moment ago, in your direct examination, that when you went over the bridge, when you first went out there, it was getting weak. What do you mean by "getting weak"?

A. Well, the timbers were weakening. You can tell; when you go across a bridge, ordinarily it feels solid.

Q. Yes.

A. And this bridge kind of teetered, as you might call it, like weak ice.

(Testimony of H. I. Lucas.)

Q. As though the piers on either side were being undermined? A. Yes.

Q. That is what the trouble was. The water wasn't as high as the bridge

A. No, but it was up pretty close to the underpinning of the bridge.

The COURT.—You mean the timbers under the bridge planking?

The WITNESS.—No; the under-capping of the piles.

The COURT.—Oh, the beams?

The WITNESS.—Yes, the beams. [302]

Q. Mr. Lucas, this damage that you are talking about being done down at the Gastineau, the Gastineau Hotel is built right up against the mountain and the dirt at the back of it, the surface of the ground up at the back of it, comes up to about the second-story window, doesn't it? A. Yes.

Q. What caused the damage there was these houses sliding down, catching and making a dam and carrying the surface water into it?

A. I should judge that the water brought down off from the hill, back up against the hotel, broke in through the windows and came in through the corridors and out the front.

Q. The water wasn't as high as the second-story window? A. No, no, the ground.

Q. In other words, they had excavated back into the hill so that the back of the lot that they had built on, was as high as the second-story window?

A. Well, yes.

(Testimony of H. I. Lucas.)

Q. That was the situation?

A. I should judge so. I have never been back of the Gastineau until after the flood. I know it was dug out.

Q. Now, then, up there on Chicken Ridge, this house of Mr. Garfield's is right square on top of the hill? A. On top of the hill?

Q. Yes? A. Yes.

Q. Don't you know that— You remember when Mr. Wetterick built the house next to it?

A. Yes.

Q. Don't you know that he excavated there for a foundation and basement? [303] A. Yes.

Q. What did he do with the earth?

A. I don't know; put it on the bank, I suppose.

Q. Threw it down, clear off?

A. Threw it down the bank of his lot, I guess.

Q. Was that the dirt pile that went out?

A. I'm sure I don't know.

Q. What is that? A. I'm sure I don't know.

Q. You don't know? A. No.

Q. Well, when you got up there, you saw that it was mighty loose looking stuff that went down, wasn't it?

A. Well, the dirt in the back of the Gastineau was pretty loose, too; pretty well washed with water.

Q. This occurred back of it, and the bank where it slid off was an extremely steep bank that ran down into the pond? A. Yes.



(Testimony of H. I. Lucas.)

Q. At an angle of more than, at least forty-five degrees?     A. Yes; all of that.

Q. So much so that it is likely that some of it would slide off most any time you walked over it?

A. Well—

Q. How is that?

A. If it was loose, I imagine it would; yes.

**Testimony of L. V. Winter, for Defendants.**

L. V. WINTER, called as a witness for the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [304]

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Winter, will you state your name?

A. Lloyd V. Winter.

Q. Where do you live, Mr. Winter?

A. Front Street; lower Front.

Q. In Juneau?     A. Yes.

Q. How long have you lived in Juneau?

A. Twenty-two and a half years.

Q. Before you lived on Lower Front Street, where did you live?     A. Up on Swede Hill.

Q. Were you in Juneau on September 26, 1918?

A. No.

Q. Where were you—do you know?

A. In Seattle.

Q. Now, prior to that time, before you went to

(Testimony of L. V. Winter.)

Seattle, were you living on what is known as Swede Hill?     A. Yes.

Q. In what house there?

A. In the Caro house.

Q. Do you know any other house that was up there?

A. Yes; the Burford house was about thirty-five feet to the north of it, on the same level.

Q. Any other houses?

A. To the south was an apartment house.

Q. Any other house up there?     A. No.

Q. Do you know where Mr. Passells lived?

A. They lived in the Burford house, thirty-five feet to the north. [305]

Q. Do you know where Mr. Williamson lived up there?

A. I believe they lived in the house that was occupied by the Passells.

Q. Do you know Mr. Gillen's house?

A. Well, that's to the south.

Q. Now, do you know where the G—— houses were up on that hill?

A. They were, I guess, seventy-five yards down toward Front Street.

Q. Now, when you returned from Seattle to your house, in what condition did you find it?

A. The lower floors of the house, about four or five rooms, had been flooded by silt and covered with mud, two or three inches of mud all over the carpets, and so forth.

Q. What did you observe with reference to the

(Testimony of L. V. Winter.)

other houses that had been up there before you went away?

A. The Burford house had been wiped off the hillside and down toward the Spickett residence, and then into the Bathe Apartment.

Q. Any other houses there washed down?

A. No; not at that time.

Q. How is that? A. No; not at that time.

Q. Did you observe any others? A. No.

Q. Now, Mr. Winter, how long had that house been there that washed down?

A. The Burford house?

Q. Yes. A. About twenty years.

Q. About twenty years. Now, I'll hand you a photograph and [306] ask you if you recognize that? A. Yes, sir.

Q. Did you take that photograph? A. I did.

Q. When?

A. November fifth, or ninth day. I don't see that date on there. Ninth day of November.

Q. What does that represent? Where was it taken from?

A. It was taken from the bridge that crosses an outlet of Gold Creek, looking north from the bridge on Willoughby Avenue.

Q. On Willoughby Avenue. Is that where the creek formerly came down—where the bulkheads were? A. It is.

Q. Is that looking up the creek?

A. That's looking up the creek.

Q. What did you find in that place where this

(Testimony of L. V. Winter.)

photograph was taken? What was in what was formerly the old bed of the creek there?

A. A lot of old stumps.

Q. Now, what character of stumps were they? What was their size?

A. Well, up to twenty-four to thirty inches.

Q. Did you see anything else in there of any consequence at that time besides stumps?

A. Oh, a lot of debris mixed up with it.

Q. This was taken just a few days ago?

A. Yes.

Mr. FAULKNER.—We offer that in evidence.

Mr. COBB.—What is the purpose of it? [307]

Mr. FAULKNER.—Well, to show the stumps that came down the creek.

Mr. COBB.—Well, if that's the purpose of it, I object to it, because we have proved and they have proved and every one of the witnesses has been asked about it—that the whole flume is filled up with debris—stumps came down there and filled the flume up on the morning of September 26, 1918. I don't know what they're going into it any further for.

Mr. FAULKNER.—Well, we want to show the condition. There are two pictures I want to introduce, showing the character of the stumps. I think the other picture shows stumps mixed up with timbers and logs. At the present time, this shows practically nothing but timber—doesn't show the character of the stumps that came down.

Mr. COBB.—It's too long after. It's five years

(Testimony of L. V. Winter.)

since and there is a picture already in evidence showing the conditions immediately afterward.

The COURT.—Objection overruled.

Mr. FAULKNER.—We'll ask that it be marked Defendant's Exhibit No. 7.

(Whereupon photograph mentioned was received in evidence and marked Defendant's Exhibit No. 7.)

Q. I will ask you if you took another photograph at that time?     A. I did.

Q. Where was that taken?     When?

A. The same day and date, within the same hour.

Q. What does that show?

A. Well, this photograph is looking south, to the direction of taking the other photograph.

Q. Looking on Willoughby?

A. The bridge. [308]

Mr. FAULKNER.—We'll offer that in evidence. We have no other photograph showing that exact spot.

Mr. COBB.—Well, I object to that as irrelevant and immaterial for any purpose.

Mr. FAULKNER.—Shows the condition under—

Mr. COBB.—Shows the conditions out there now. It's been testified by one witness, I have forgotten which, that the whole situation has been changed, and the bridge rebuilt since then.

Mr. FAULKNER.—Well, I didn't hear that.

Mr. COBB.—Well, it's a fact, anyway.

The COURT.—I fail to remember any such testimony.



(Testimony of L. V. Winter.)

Mr. COBB.—I think one of the witnesses testified to that effect.

The COURT.—It can be received and you can examine him on it as to whether it is in the same condition that it was then.

Mr. COBB.—It was only taken a few days ago.

The COURT.—I know.

Q. You took this picture on the same day?

A. Yes.

Q. This is the same place, only looking in the other direction?

A. Looking in the direction of the position of the camera.

Q. Looking toward the sea?

A. One looking north and the other looking south.

Mr. COBB.—Well, I can examine him on it and then you can offer it. I don't think it is material.

The COURT.—Well, the Court does. You can examine him as to whether they are in the same condition; whether the configuration is the same as it was immediately afterward. [309]

Cross-examination.

(By Mr. COBB.)

Q. Mr. Winter, do you know of any other houses up there on the hillside now that have been there twenty years? A. I presume there are some.

Q. How is that?

A. I presume there is, but I couldn't testify as to how many or which particular ones.

Q. I say, there are houses up there now that have been up there for twenty years? A. I believe so.

(Testimony of L. V. Winter.)

Q. Now, prior to 1918, had there been anything done up on the mountainside there that would most likely cause mud and rain slides at the time you first moved there?

A. That would cause mud and rain slides?

Q. Yes; in rainy weather.

A. I don't know about that.

Q. There had been a tramway built around there and the excavation material thrown down the hill?

A. I understand they had put up some electrical towers.

Q. Prior to 1918, hadn't the Alaska-Juneau Gold Mining Company built a flume and a track above where you are speaking about?

A. No; that does not extend anywhere near there.

Q. How is that?

A. That doesn't extend anywhere near there.

Q. Doesn't extend that far?

A. The house occupied by myself; no.

Q. I didn't recall just where your house was.

A. My residence is at the upper end of Rawn Way and Gastineau Avenue. [310]

Q. Your residence, that you speak of, is this side of the mouth of the tunnel that goes through the mountain there, about six or eight hundred feet?

A. Oh, a quarter of a mile.

Q. These pictures that you took the other day, do they show the conditions as they existed after the flood of 1918?      A. I presume so.

Q. Do you know whether they do?

(Testimony of L. V. Winter.)

A. I believe they do.

Q. Do you know it?      A. Yes, sir.

Q. Were you down there just afterwards?

A. Beg pardon?

Q. Were you down there just after the flood?

A. About three or four months later.

Q. How is that?

A. About three or four months later. I don't recall the date of the slide. If I knew that, I could tell you how soon after.

Q. Well, it was September 26, 1918.

A. November 26th?

Q. September?

A. September. I was there six weeks later.

Q. Six weeks later?      A. Yes, sir.

Q. That would be somewhere around the middle of November?      A. Yes, sir.

Q. There had been heavy rains in October, hadn't there?      A. Yes.

Q. You know whether the condition was the same when you saw it in November? [311]

A. Yes, sir; very similar to that.

Q. Well, I say, do you know whether they are just the same as those after the flood of September 26?

A. You're speaking of this condition in the photograph?

Q. Yes.      A. Yes, sir.

Q. No, that isn't the question. Do you know if, when you first saw this ground that you photographed here about the middle of November, 1918,

(Testimony of L. V. Winter.)

the conditions were the same there as the preceding September?     A. Oh, I don't know about that.

Q. You don't know as to that?

A. The question is not altogether clear.

Q. Do you remember the rebuilding of the bridge across Gold Creek there at Willoughby?

A. I remember there being some repairs done there; yes.

Q. Had it practically rebuilt?     A. Yes.

Q. Did that immediately after the flood?

A. I think some time after; yes.

Mr. COBB.—Now, I'll ask—I don't think it of much importance one way or the other—I ask to have these photographs excluded. They are not competent evidence that I can see for any purpose.

Mr. FAULKNER.—That is not all the testimony regarding the photographs. I just want to show that Mr. Winter took them and the position from which he took them. I have other testimony on these same photographs.

Mr. COBB.—I reserve my motion then. [312]

### **Testimony of I. J. Sharick, for Defendants.**

I. J. SHARICK, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Sharick, please state your name, will you?

A. Yes.

(Testimony of I. J. Sharick.)

Q. Your name?     A. I. J. Sharick.

Q. Mr. Sharick, where do you live?

A. Juneau.

Q. How long have you lived in Juneau?

A. Since 1898.

Q. 1898?     A. Yes.

Q. Have you kept any weather records?

A. I have.

Q. In that period?     A. Yes.

Q. What period?

A. I commenced about 1894.

Q. 1894?     A. Yes.

Q. Now, how far did those records go?

A. About 1912.

Q. To about 1912?     A. Yes.

Q. Have you the periods of the highest, the highest periods of rainfall with twenty-four hour periods during that time? [313]

A. Yes, I have a copy of the record.

Q. Will you refer to your copy?     A. Yes.

Q. What was the highest rainfall in twenty-four hours, within those records?

A. The highest was 4.01 inches.

Q. When was that?

A. That was in September, September 7, 1902.

Q. When was the next highest?

A. The next highest was in October, the 17th, 1905.

Q. What was that?     A. That was 3.50.

Q. What was the next?



(Testimony of I. J. Sharick.)

A. The next was in August, the 26th, 1905; that was 2.17.

Q. Those are 24-hour periods?

A. Yes; those are the highest during the month.

Q. Were you a volunteer weather observer?

A. Yes; I was an observer for the Government; yes.

Q. Did you keep that on the Government records?

A. Yes; I have the records; I have them here.

Q. Did the Government supply you with those records?     A. Yes.

Q. I mean, they supplied you with the blanks?

A. They supplied me with the blanks.

Q. And you kept accurate records during those periods?

A. I kept the records during that time.

Cross-examination.

(By Mr. COBB.)

Q. Did you keep any records up in the basin?  
[314]

(No response.)

Q. I say, you didn't keep any records up in the basin?

The COURT.—You'll have to come up closer.

A. I didn't hear you?

Q. I say, you didn't have any records kept of the rainfall up in the basin of Gold Creek?

A. No; it was right in Juneau.

Q. Right in Juneau.     A. Yes.

(Testimony of I. J. Sharick.)

Q. And you haven't any records for 1913? Do your records show 1913?

A. I got it on my books there. I haven't got a copy of it.

Q. 1913? A. No; not 1913.

Q. You haven't any records for that year?

A. That's after—

Q. (Interrupting.) Yes.

A. 1912, when I quit keeping the record.

**Testimony of W. W. Casey, for Defendants  
(Recalled).**

W. W. CASEY, recalled, one of the defendants herein, having been previously duly sworn, testified as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. Mr. Casey, I'll hand you a photograph marked Defendant's Exhibit No. 7 and ask you if you recognize that? A. Yes, sir.

Q. What does it represent?

A. A portion of the old cribbed channel above the bridge.

Q. The bridge?

A. The bridge just north of there. [315]

Q. Is that represented at the present time?

A. At the present time?

Q. What is in there at the present time?

A. Stumps and old logs.

Q. Now, are the stumps that are shown in that

(Testimony of W. W. Casey.)

photograph, the same stumps that came down the flood of 1918?   A. Yes, sir.

Q. Has that section been changed any since the flood? Has anything been taken away from there?

A. Yes; the Indians have gone in there and cut wood and taken away all that they wanted.

Q. So that this portion that remains was there at the time of the flood?   A. Yes.

Q. Have any of those stumps been put in there since the flood?   A. I don't think so.

Q. Now, I will hand you defendant's exhibit No. 8 and ask you if that represents the same section?

A. The same section, south of the one shown there.

Q. And the stumps shown in that picture—

A. (Interposing.) Are the same.

Q. Were brought in there by the flood?

A. Yes, sir.

Q. Have any of them been put in there since?

A. No, sir.

Q. Now, Mr. Casey, there is a bridge shown here, crossing—what they call the Willoughby Avenue bridge. Has that bridge been built since the flood?   A. No, sir.

Q. Is that the same bridge that has been there since the flood? [316]   A. Yes, sir.

The COURT.—Is in the same condition it was at the time of the flood?

The WITNESS.—That's the stump that hit the bridge (indicating).

(Testimony of W. W. Casey.)

The COURT.—All right.

Q. You can identify that stump, can you?

A. Yes, sir.

Cross-examination.

(By Mr. COBB.)

Q. Were all the buildings shown in that picture there in 1918?     A. I didn't hear you.

Q. How is that?

A. I didn't understand you.

Q. I say were those buildings there in 1918?

A. Yes, sir.

Q. Any building there in 1918 that is not there now?

A. Well, they have torn down Jimmy McKenna's barn that was there that year.

Q. Doesn't show, then, the same condition.

A. The foundation of the barn is still there.

Q. I say this picture doesn't show exactly the condition that was there in 1918?

A. Aside from that.

Q. Did you say the Indians had taken some stuff out of there?     A. Yes, some logs.

Q. That is not shown in this picture?

A. No; they have cut some wood and carried it away.

Q. There is some difference, then, besides the foundation of the house that was moved. [317]

A. Yes.

Q. There is quite a difference between the conditions shown in this picture and the conditions in 1918, isn't there, Mr. Casey?

(Testimony of W. W. Casey.)

A. There is a lot of wood gone.

Q. Hasn't that bridge been repaired? Wasn't it repaired after the flood of 1918?

A. I don't know. They may have repaired the street there.

Q. Don't you know they did that—that it was necessary to do it? You were living out that way.

A. We used it the day of the flood.

Q. I am not asking you, now, whether you used it the day of the flood, but wasn't it repaired by the city?

A. Not to my knowledge. It may have been.

Q. You mean by that that you weren't there when it was repaired, but you know it was repaired? A. No, sir.

Q. You don't? A. No.

Mr. COBB.—Now, I'll renew my motion.

The COURT.—He points out a certain stump that he says struck the bridge on the 26th of September, 1918; and another reason is that the picture shows the general character of the stumps and the difference between what it is like now and the time the first picture was taken.

Mr. FAULKNER.—The other picture shows the top of the pile and this one shows the bottom.

The COURT.—Motion denied.

Mr. WICKERSHAM.—Exception.

Mr. COBB.—We'll take an exception. [318]



**Testimony of John C. Hayes, for Defendants.**

JOHN C. HAYES, called as a witness on behalf of the defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name?

A. John C. Hayes.

Q. What is your occupation?

A. Superintendent of the Alaska Road Commission.

Q. Where do you live?      A. Juneau.

Q. How long have you lived in Juneau and vicinity, Mr. Hayes?

A. Well, I have been here off and on for about 10 years.

Q. Were you here September 26, 1918? (162—149)      A. Yes, sir.

Q. Did you observe the rainfall and the high water and the flood on that day?

A. Yes, sir.

Q. Had you ever in your experience, Mr. Hayes, seen as great a rainfall or as high water in Gold Creek and vicinity as there was on that day?

A. Not to my observation, no, sir.

Mr. FAULKNER.—That is all.

Mr. COBB.—No cross-examination.

(Witness excused.) [319]

**Testimony of Geo. H. Canfield, for Defendants.**

The testimony of GEO. H. CANFIELD, also taken on former trial, as follows:

**Direct Examination.**

(By Mr. FAULKNER.)

Q. Please state your name.

A. George H. Canfield.

Q. What office do you hold—what position do you occupy?

A. Engineer, United States Geological Survey.

Q. What are your duties, Mr. Canfield?

A. My duties are gathering daily stream fall records in several stream in which we have installed gaging stations in Southeastern Alaska.

Q. How long have you been engaged in that work, Mr. Canfield?     A. Since 1910.

Q. And have you a gaging station in Gold Creek, near Juneau?     A. Yes, sir.

Q. Have you the measurements of the volume of water in that stream?

A. Yes, sir, since July 20th, when the gage was installed, to date—July 20th, 1916.

Q. Have you a record showing the volume of water in Gold Creek on September 26, 1918?

A. Yes, sir, a record which we computed from the chart recorded in the gage set in Gold Creek, which kept a record of that up until about one o'clock, when it was disarranged by the flood; but we took the peak in the creek and estimated from

(Testimony of Geo. H. Canfield.)

that from two o'clock and the remainder of the day.

Q. What was the highest point it reached?

A. The highest point was the stage indicated by the record of 6.81 feet, which corresponds to a flow of 2,600 cubic feet per second, which I have computed from the available data which I have.

Q. 2,600 cubic feet per second? (182—169)  
[320] A. Yes.

Q. At what point was that, Mr. Canfield?

A. I have estimated that about 2 o'clock.

Q. At what point in the creek?

A. That is at the Gold Creek bridge, on the way to Perseverance.

Q. The first bridge?

A. Yes, the first bridge.

Q. What is the highest number of cubic feet per second for any period before that, in your records?

A. The highest period before that—between July 20, 1916, and that date was 1,000 cubic feet per second, on August 19, 1917.

Q. So that the volume on September 26, 1918, was a little over  $2\frac{1}{2}$  times as great as the highest period before that within your operations?

A. Yes, sir.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. You have no records going back of that at all, Mr. Canfield?

(Testimony of Geo. H. Canfield.)

A. No, we have no records at all previous to that date.

Q. This instrument does it record the actual number of cubic feet passing down the stream—how do you arrive at that?

A. The instrument records the elevation of the water—the surface, at any time. The instrument is operated by a float that rests in the well, and as the water rises in the well it is recorded on a paper which runs over a drum, which moves by clock-works, so at any time you can take from this chart the corresponding height of the water.

Q. Now, the volume of water that passes any given point in a flowing stream, what does that depend upon—what elements?

A. The volume depends upon the area of the cross-section and the velocity, or feet per second; multiplying these together gives the product we call cubic feet per second. [321]

Q. Now, if your cross-section of the channel shows 150 feet, how rapidly would the water have to be moved to take care of 2,600 cubic feet per second?

A. It would be 2,600 divided by 150—approximately 15.

Q. It would be 17 and a fraction, wouldn't it?

A. It would be 150 into 2,600.

Q. And suppose your cross-section had 230 square feet, it would not have to move so fast?

A. No, it would not.

(Testimony of Geo. H. Canfield.)

Q. Can you tell the jury about how fast a stream would run on a two per cent grade?

A. That would involve formulas and computations, and I couldn't say offhand.

Q. If your channel, however, had a cross-sectional area of 230 square feet or more, on the same grade, it would take care of a great deal more water than your 150 feet cross-section would it not?

A. Yes, sir.

Q. And isn't it also a fact that the cross-sectional area of the channel, other things being equal—that is, the grade being the same, the flow would be more rapid in the middle?

A. Yes, the velocity is more rapid towards the middle, unless there are some disturbances.

Q. So that the cross-sectional area of a channel 230 feet would take care of considerably more water than the same ratio as to 150, isn't that a fact?

A. I would have to figure that out from the formulas.

Q. Isn't the principle applicable to that, that there would be a more rapid flow in the center—less friction?

A. Yes; if the area was doubled the flow would be more than doubled.

Q. That is, the capacity of the channel on the same grade increases in a greater ratio than its cross-sectional area?

A. I am not prepared to state definitely on that.



(Testimony of Geo. H. Canfield.)

Q. That is, you are not prepared to say how much greater it [322] would be?

A. No. (184—171)

Q. But it is greater—the ratio is greater?

A. I am not prepared to state that, either.

Q. Can you prepare yourself to answer that question?

A. I do not think that involves my official duties—I am just giving the flow of the creek at that time.

Mr. COBB.—Very well. That is all.

(Witness excused.)

### **Testimony of Geo. T. Jackson, for Defendants.**

The testimony of Geo. T. JACKSON, also taken on the former trial as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Will you please state your name.

A. George T. Jackson.

Q. What is your profession?

A. Mining Engineer.

Q. How long have you been engaged in that work, Mr. Jackson?      A. About 20 years.

Q. Where do you live?      A. Juneau.

Q. How long have you lived here, Mr. Jackson?

A. Eleven years.

Q. Are you familiar with the weather conditions in and around Juneau?      A. Yes.

Q. Now, Mr. Jackson, in that 11 years what has been your work—where have you been engaged?

(Testimony of Geo. T. Jackson.)

A. Well, I was engaged at the Perseverance, the old Perseverance mine, as assistant superintendent for four or five years; mine superintendent at the Perseverance for about three or four years; assistant manager and manager of the Alaska Gastineau Mining Company.

Q. All of the eleven years your work has been around the Perseverance mine? A. It has.

Q. And where is the Perseverance mine situated in reference to Juneau and Gold Creek? [323]

A. Almost at the head of Gold Creek.

Q. Back in the canyon?

A. Back in the canyon; yes, sir. (159—146)

Q. North of Juneau. Are you acquainted, Mr. Jackson, with the periods of high water in Gold Creek, during that period of eleven years?

A. Yes, I have had a good deal of trouble from floods during that time.

Q. Were you in Juneau and vicinity of September 26, 1918? A. I was.

Q. Did you observe the flood and the conditions that existed at that time? A. Yes.

Q. I will ask you whether at any time within your knowledge there had been a period of such high water as there was that day—had you ever seen the water as high as it was that day?

A. No, I never had.

Q. Had you ever seen the rainfall as great as it was on that day and during the 24 hours previous?

A. No; our records show that was the highest ever since we kept them—six or seven years any-

(Testimony of Geo. T. Jackson.)

way, and I noticed the creek before that for three or four years.

Mr. COBB.—I object to his testifying about his records, and ask that the answer be stricken.

The COURT.—Just answer the question.

Q. Within your recollection then, that was the highest point?     A. Yes.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. Whereabouts did you measure it from Mr. Jackson?     A. From these records.

Q. You said it was the highest point—have you any particular [324] point?

A. I am gauging by the damage the waters did—the places it damaged that it never did before.

Q. What point do you refer to? (160—147)

A. I am referring to a point near the red mill—the bridge that has been in there—I believe built by the Alaska Juneau, and that bridge has stood for many years—probably fifteen—and this flood took out the approach to that bridge for nearly 150 feet or more—washed it clear away and left the bridge high and dry.

Q. Hasn't that happened before?     A. No.

Q. You are positive of that, Mr. Jackson?

A. I am positive of that.

Q. How long back are you testifying to that it hasn't happened?

A. Since I have been in the country—eleven years.

(Testimony of Geo. T. Jackson.)

Q. Eleven years—it hasn't happened as far back as you can go?     A. Yes.

Q. As a matter of fact, Mr. Jackson, every few years we have high floods in Gold Creek, don't we?

A. Yes, we do.

Q. Periods of high water?     A. Yes.

Q. The head of the creek is approximately how high above the level of Gastineau Channel?

A. At Perseverance about 1100 feet,—1100 feet at the foot of the Perseverance.

Q. How many miles upstream is that?

A. Four and one-half miles.

Q. A drop of 1100 feet in  $4\frac{1}{2}$  miles?

A. Yes, sir.

Q. And precipitous mountains on either side?

A. Yes.

Q. So that the conditions are ideal for quick and heavy floods in the stream?     A. Yes.

Q. You wouldn't undertake to say positively that this is the highest flood that has ever been in Gold Creek there? (161—148) [325]

A. Since I have been here—to my knowledge, yes.

Q. From your knowledge or your opinion?

A. My opinion based upon my observation.

Q. But beyond that you would not say?

A. Of course, you say I cannot use the records,—according to the records we have kept it is the highest.

Q. Who kept those records?

A. They were kept at Perseverance.

(Testimony of Geo. T. Jackson.)

Q. Have you got them?

A. We have got them, yes.

Q. Didn't counsel ask you to bring them with you? A. I will bring them up.

Mr. FAULKNER.—I will put them in later.

A. They are turned into the regular Bureau—we kept them for the Government—they are officially kept.

Mr. COBB.—I didn't know they were here. I inquired of the Government man here and he didn't have them. That is all.

(Witness excused.) [326]

### **Testimony of Henry States, for Defendants.**

The testimony of HENRY STATES, also taken on the former trial, as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Judge, how long have you lived in Alaska?

A. Oh, thirty-seven years.

Q. Thirty-seven? A. Thirty-seven.

Q. When was Juneau first settled by white men?

A. 1881?

Q. In 1881? A. Yes.

Mr. FAULKNER.—I think that's all.



Defendants next read in evidence the deposition of HENRY SHATTUCK, as follows:

**Deposition of Henry Shattuck, for Defendants.**

Interrogatory No. 1. Are you one of the defendants in the above-entitled cause? A. Yes.

No. 2. Did you, in the fall of 1914, or at any other time, have a conversation with A. Eikland, the plaintiff in this case, regarding the building of the bulkheads on the banks of Gold Creek mentioned in the complaint of this case?

A. I may have, and probably did, discuss matters with him in a neighborly way regarding the bulkhead construction referred to, as he lived near by and we were on friendly terms.

No. 3. Did A. Eikland, one of the plaintiffs in this case, in the fall of 1914, or at any other time, protest about the building of the flume or bulkheads on Gold Creek mentioned in the complaint?

A. He did not object to the construction of the bulkhead in 1914, or at any other time, but, on the contrary, was well disposed towards the construction mentioned on account of the protection it would afford his property. One of the weak spots in the bank of Gold Creek, prior to the building of the flume and bulkhead in 1914, was immediately in the rear of his lot, and the bulkhead kept the stream from cutting any [327] further into the bank towards his property.

No. 4. Did A. Eikland, one of the plaintiffs in this case, tell you in the fall of 1914, or at any other time, that the building of the bulkheads and flume

(Deposition of Henry Shattuck.)  
on Gold Creek mentioned in the complaint herein would endanger his property, or that he was opposed to the building of the same?

A. He did not in 1914, or at any other time.

Cross-interrogatory No. 1. In what business were you engaged in the fall of 1914?

A. I was engaged in the hardware business at Juneau, Alaska.

No. 2. Did you personally take any part in the building of the bulkheads referred to in the direct interrogatories? A. Yes.

No. 3. Did you testify in that case on a former trial? A. No.

No. 4. Is it not a fact that W. W. Casey had entire charge of the building of the bulkheads referred to in the direct interrogatories and was looking after the property, and that you were devoting practically all your time to your other business in the year 1914.

A. Mr. Casey had active charge of the construction, but I went frequently to see the work and often discussed it with both Mr. Casey and Allen Shattuck. [328]

### **Testimony of Gustave Anderson, for Defendants.**

GUSTAVE ANDERSON, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

#### **Direct Examination.**

(By Mr. FAULKNER.)

Q. Please state your name.

(Testimony of Gustave Anderson.)

A. Gustave Anderson.

Q. Where do you live, Mr. Anderson.

A. I live on Sixth and Kennedy.

Q. In Juneau?     A. Yes.

Q. How long have you lived here?

A. I lived in Juneau for twenty-three years?

Q. For twenty-three years?     A. Yes.

Q. Are you familiar with Gold Creek where it comes out over the Casey-Shattuck property?

A. Yes.

Q. How long have you been familiar with that creek, Mr. Anderson?

A. Well, I can say for about eighteen years.

Q. Eighteen years.     A. Yes.

Q. Did you ever do any work down there?

A. Yes.

Q. Whereabouts was that?

A. Well, I helped to do some work down there in many places on that creek. I worked high up in the basin and way down on the beach—different places along the creek.

Q. I mean down in the vicinity of the electric light plant.     A. Well, I done work there; yes.  
[329]

Q. When was that?

A. In 1908 I worked for the electric light company.

Q. In 1908?     A. Yes.

Q. Now, where was the creek-bed then?

A. Well, the creek-bed—I can't say just exactly

(Testimony of Gustave Anderson.)

where it was. That has been shifting time and time again.

Q. Shifting some?

A. Yes; from year to year; and I can't say exactly where the creek-bed was.

Q. Was there a creek-bed close to the electric light plant?

A. Some times there was, and sometimes there wasn't. Some years there was close to the plant and even went under the coal-bunker.

Q. Went under the coal-bunker of the electric light company?

A. What coal-bunker it was, I don't know. I don't know whether it is there now or not, but it's been there since 1909, I think.

Q. What kind of work did you do there?

A. In 1908, we dammed up the creek because it was going into the electric light plant. I think Mr. Pullen was in charge at that time.

Q. To keep it from going into the electric light plant?

A. Yes; the creek was going into the light plant, and when we dammed up the creek, it was low. Of course, you couldn't dam it up when the creek was high, but we dammed it up when the creek was low.

Q. You did that to keep the water from going into the electric light plant? A. Yes. [330]

Q. And did you do any more work out there afterward?

(Testimony of Gustave Anderson.)

A. In the year afterward, Henry Shattuck had me there to work for him.

Q. Where was that?

A. That was opposite that coal-bunker, too—just the same channel where I was working before.

Q. The same channel.

A. Yes. And I cut brush and put it in there, and the intention was to get the gravel that was coming down to wash into the brush. The brush didn't do any good itself, except that it was there and the creek was going to do the rest of the work.

Q. To keep the creek from going over towards the eastward?

A. Yes; keep the creek from going over to the plant.

Cross-examination.

(By Mr. COBB.)

Q. Just a minute. That whole flat out there is what is commonly called a delta, isn't it?

A. I think so.

Q. That is, from the electric light company's plant clear across the flats, it's low, flat ground?

A. Yes.

Q. Been made there by the water and stuff brought down by the water. Now, you say the creek channel, the main channel, was constantly shifting from one side to the other?

A. That is, when there would be flood waters, or something or another.

Q. It would shift; the channel would shift from



(Testimony of Gustave Anderson.)

one side to the other. That was the character of the ground? A. Yes. [331]

Q. During the time that you worked there, had you observed a great deal of high water at times?

A. No; I can't say that I have.

Q. Oh, you were working only at low water?

A. I worked only when the water was low; yes.

Q. When the high water came, you never observed it?

A. No; I never observed it particularly.

Q. You only worked at the season of the year when there was no high water? A. That's it.

Q. But you could tell that there was a shifting of the channels made by high water?

A. I suppose it was. Couldn't be nothing else.

Mr. COBB.—That's all.

Mr. FAULKNER.—That's all. [332]

**Testimony of Mark Sabin, for Plaintiffs (In Rebuttal).**

Then plaintiffs, in rebuttal, introduced the testimony of MARK SABIN, as follows:

**Direct Examination.**

(By Mr. COBB.)

Q. State your name. A. Mark H. Sabin.

Q. Where do you reside, Mr. Sabin?

A. Juneau—12th Street.

Q. Do you know where the flume that was built some years ago by the owners of the Casey-Shattuck addition to carry the waters of Gold Creek passes under Willoughby Way? A. Yes, sir.

(Testimony of Mark Sabin.)

Q. Did you put any poles in that flume under the Way?

A. I put some posts under the bridge in there.

Q. When was that done?

A. Oh, it was last fall—some time late last fall—I don't remember.

Q. Was it after the flood?     A. Yes, sir.

Q. There was none there before that?

A. I don't know, I didn't notice any.

Q. The piles that are there now are what you put in,—you didn't notice any at that time?     A. No.

Q. You put in some since for the purpose of supporting the bridge?

A. We put in some poles in there—jacked it up and put some posts under it—that was after the flood.

Q. There was a bridge entirely across it?

A. How is that?

Q. There was a bridge entirely across it?

A. Oh, yes. (217—204)

Q. No supports under it at that time, in the flume itself?     A. Well, not to my knowledge.

Q. I say at the time you went there you didn't find any?     A. No, there wasn't any.

Q. There was no piling there that was stopping and holding [333] the debris?

A. No, there was none supporting the bridge, because I jacked it up and set some posts under it.

Q. I will ask you if those posts were put in the ground or simply set on it?

A. Set on top of the ground.

(Testimony of Mark Sabin.)

Mr. COBB.—That is all.

Cross-examination.

(By Mr. FAULKNER.)

Q. You don't know, Mr. Sabin, what was there before the flood?

A. No, I never had anything to do about building that bridge.

Mr. FAULKNER.—That is all.

(Witness excused.) [334]

### **Requested Instructions to the Jury.**

And thereupon, and before the jury retired from the bar, the plaintiffs in writing prayed the Court to instruct the jury as follows:

“Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it was their duty to see that the new channel which they provided as a substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs' property was one which might reasonably have been anticipated; that the plaintiffs' property was situated on high ground far above the reach of flood waters from Gold Creek, and that because of the construction of said flume and bulkheads in the manner and of the capacity

they were, the flood waters were directed against the plaintiffs' property and caused the damages complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given. In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you will take into consideration the evidence as to the cost thereof, its condition of repair, and all other circumstances in evidence bearing upon that question. In addition to such sum as you may find for the damages to the house and lot you will add the fair market value [335] of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

But the Court refused said prayer, to which ruling, the plaintiffs then and there excepted.

Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an 'act of God' as that term is used in the law."

But the Court denied said prayer, to which ruling the plaintiffs excepted.



Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

“If the building of the bulkheads and flume by the defendants caused the damage to the plaintiffs’ property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damage to the plaintiffs’ property; but the flume and bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the bulkheads and flume so controlled and influenced the flow of the flood waters and to deflect the current against plaintiffs’ lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damages could not have occurred? If it was, the defendants are liable. [336]

“In deciding this question, you should bear in mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs’ house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of flood and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook



to interfere with the natural channel and course of the stream.”

But the Court denied said prayer, to which ruling the plaintiffs excepted.

Plaintiffs further prayed the Court in writing, to instruct the jury as follows:

“If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course, and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs’ lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs’ property; but that because of the building of the cribbed or bulkheaded channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural [337] channel, and the current driven ‘against the plaintiffs’ property, thereby undermining it, and washing it away, you will find for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26, 1918, was the highest ever known in the creek or not.

To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

But the Court denied said prayer, and the plaintiffs excepted.

The plaintiffs thereupon further prayed the Court in writing to instruct the jury as follows:

It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to safely carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all of the natural channels it was to replace; if he who builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damage caused by such negligence.

But the Court denied said prayer and the plaintiffs excepted.

The plaintiffs further prayed the Court in writing [338] to instruct the jury as follows:

“If you find and believe from the evidence that on September 26th, 1918, timbers or logs washed out of the bulkheaded or cribbed channel built by defendants at a point approximately opposite the upper end of plaintiffs’ lot, and such timbers or logs lodged in the channel of the creek causing a dam, or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs’ property, then I instruct you to find for the plaintiffs.”

But the Court refused to so instruct, to which ruling of the Court the plaintiffs duly excepted.

And thereupon the Court instructed the jury as follows:

### **Instructions of Court to the Jury.**

“Gentlemen of the Jury: This is a civil action brought by A. Eikland and O. Eikland, as plaintiffs, versus W. W. Casey, Henry Shattuck and Allen Shattuck, defendants, for compensation in the nature of damages for the destruction of certain property of plaintiffs, alleged to have been caused by the overflow of Gold Creek, which overflow they attribute to the negligence of the defendants in constructing certain dams, abutments and flumes and altering the natural flow of the waters of said creek.

“The plaintiffs allege that in the year 1913 the defendants were the owners of a certain tract of land, embracing the flats bordering on a part of Gastineau Channel at the mouth of Gold Creek and

extending on both sides of said Creek, which said tract was subdivided into lots and blocks as the 'Casey-Shattuck Addition' to the town of Juneau, and that in that year they sold to the plaintiffs Lot 6 in Block 209 of said Addition, and the plaintiffs erected on said lot that [339] year a substantial dwelling-house at a cost and the reasonable value of \$3,000. It is further alleged that Gold Creek flows from a mountain range east of Juneau through a canyon out of which it flows near the boundary of the Casey-Shattuck Addition and across such addition into Gastineau Channel; that the watershed of the stream is very precipitous, and in times of heavy rains, to which the country is subject, there are periods of flood or high waters in the stream. Plaintiffs further allege that their house and lot was situated on the south side of the stream and a short distance therefrom, and a short distance below the point where the stream emerges from the mountain to a point some distance below plaintiffs' lot, the stream was confined by banks sufficiently high to contain the stream at all stages of water, even the highest floods, but that a short distance below plaintiffs' lot the stream, at times of high water, overflowed the banks and spread over a part of the Casey-Shattuck Addition and thereby allowed a free outlet to the waters to Gastineau Channel, and that in its natural condition plaintiffs' lot was far above any danger from flood waters of said stream at any and all stages. Plaintiffs further allege that after the sale of the lot by the defendants to them and after they had built their house and im-



proved the property the defendants, for their own purposes, viz., reclaiming a part of the said Casey-Shattuck Addition and making the same marketable which before had been subject to floods and overflows, built a dam or bulkhead across the stream at a point about opposite plaintiffs' lot, and from said dam and a point opposite and across the stream therefrom constructed bulkheads of logs and loose stones to Gastineau Channel at a point to the southwest, and thereby changed the course of the stream and deflected it sharply to the southeast in a curve around the west and south sides of plaintiffs' lot; and they further [340] allege that the new channel thus constructed, while sufficient to carry the waters of the stream at ordinary stages, was too shallow and too narrow and wholly insufficient to carry the waters at times of floods such as ordinarily occur therein at times of heavy rains; so, the stream as dammed and changed in its course, became a danger and menace to plaintiffs' property, and the defendants were fully warned and apprised of this before the said structures were built and that the said structures and changes in the channel of Gold Creek would inevitably cause damage to the plaintiffs' property, which would otherwise be entirely safe, at the first high water occurring after their completion. It is further alleged by the plaintiffs that the defendants were grossly negligent in the planning and construction of the flume to carry off the waters of the creek in this: They allege that the flume was planned and laid out with a depth of only five feet and a width of thirty feet



or thereabouts from its head to a point near its mouth, thereby being given a capacity of not more than one-half the capacity of the original creek channel it was to replace, which creek channel, it is claimed defendants well knew or could have known, was frequently taxed to its full capacity by flood waters coming down the creek. And they further allege that at a point near its mouth and thence to the point of discharge the flume was narrowed to a width of only 25 feet, thereby still further decreasing its capacity, and furthermore, rendering it extremely likely, if not inevitable, that in times of high water the usual debris coming down said creek at such times would become choked at said narrow point and thereby entirely prevent the flow of waters through the flume. And the plaintiffs further allege that the construction of the flume was too flimsy, weak and insufficient to hold together during flood waters of the creek, but on the contrary was such as to [341] permit the waters of the creek to undermine the walls of logs and wash them out into the flume and release the waters upon and against the adjacent ground. Plaintiffs further allege that on or about September 26th, 1918, there occurred one of the usual, periodical, heavy rains to which the vicinity is subject, and which caused the waters of Gold Creek to rise and pour out of the canyon into the Casey-Shattuck lands, and that the waters, unable to flow across the flat in their usual way, because of the dam, were forced through and down the flume or artificial channel; that said waters were laden with debris and because of the

narrowing of the flume or artificial channel at or near its mouth, the channel became choked so as to prevent the greater part of the flood waters from escaping through it, and by reason of the obstruction caused by the choking and the insufficient and weak walls of the flume or artificial channel, a part of the walls and the material out of which the walls were constructed gave way and were washed out into the flume and this caused the waters and the full force of the current to be deflected and to carry away a part of the westerly wall of the flume or artificial channel adjacent to the plaintiffs' property, and thereby caused the current to impinge upon, undermine and wash away the plaintiffs' house, together with its contents, and washed away the earth and soil on the lot itself, so that the deep channel of Gold Creek occupied the space formerly occupied by the lot and house, and that the lot and house with its contents, were an entire loss to the plaintiffs, which they say was due to the construction of said dam and bulkheads in a negligent, defective and insufficient manner, and they ask judgment for the value of the house and contents, and of the lot, which they allege to be \$5,000.

The defendants in their answer, deny each and every allegation of the complaint, except they admit they were the [342] owners of the tract of land embraced in the Casey-Shattuck Addition in 1913, at the mouth of Gold Creek, and that they subdivided it into lots and block and placed it on the market as the Casey-Shattuck Addition to the Town of Juneau. They further admit that they sold lot

6 in block 209 to the plaintiff, A. Eikland, and they admit that the plaintiff erected a house on said property which they say was not worth more than \$1,500. They further admit that Gold Creek flows from the mountain range east of Juneau across the Casey-Shattuck Addition, and that there are periods of floods in this region and that the lot aforesaid was situated on the southeast side of the stream, far above any danger from floods from said stream during the periods of ordinary high water. They further admit that they built a bulkhead, but allege that the said bulkhead was so constructed that the said channel could carry the waters of said stream at all times, including freshets and periods of high water. They admit that on September 26th, 1918, a flood occurred, due to the heavy and unusual rains which caused the waters of Gold Creek to rise and that the said flood damaged the property of the plaintiffs, but allege that the said flood and the said rains were unusual, unprecedented and extraordinary and such as have never before occurred in the vicinity, and such as could not have been foreseen by the defendants or anyone else, and allege that the damage was due solely to an act of God; and they deny that the damage to said lot was in excess of \$1,500.

The plaintiffs in their reply, deny that the damage was done by an act of God.

The above and foregoing are the issues made by the pleadings, and you are instructed in this connection, that those matters alleged by the plaintiffs and admitted by the defendants in the pleadings

are to be taken by you as true in your consideration of the case. That is to say, they are matters over which there is no controversy. You will, therefore, in considering the case, accept the following facts as true, namely: That in 1913 defendants sold to the plaintiff the lot mentioned in the pleadings; that the plaintiffs built a house thereon; and that subsequently the defendants, for purposes of their own, erected along the banks of Gold Creek, on either side thereof, bulkheads for the purpose of confining the stream; that on or about September 26th, 1918, the lot with the house thereon and its contents, was damaged by the flood or washed into Gold Creek.

The foundation for this action is the alleged negligence of the defendants in the construction of a so-called flume and series of bulkheads, confining or diverting the waters of Gold Creek from their natural course, by reason of which the waters of said creek were thrown on the property of the plaintiffs, and the property damaged or destroyed."

The Court further instructed the jury as follows:

"Naturally two questions arise under the issues and admitted facts as I have detailed to you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an



act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven, for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the [344] plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not liable.

Now, Gentlemen, all acts of negligence are not actionable. While it is a canon of the law that a man should so use his own as not to injure another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of an act, in the light of attending circumstances, is not actionable. To constitute proximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one



which, in the light of attending circumstances, an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. [345]

A natural consequence of an act is a consequence which ordinarily follows from it, the result of which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you should find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the con-

struction of the bulkhead or flume, then the defendants are liable, and your verdict should be for the plaintiffs."

To which instructions the plaintiffs then and there excepted. And the Court further instructed the jury as follows:

"In viewing the circumstances attendant on the construction of the flume, and determining whether it was the proximate cause of the damage, you should take into consideration the facts shown by the testimony in reference to the climatic conditions of the country, the flow of Gold Creek, its liability to floods from heavy rains and melting snows or otherwise, its situation with reference to the surrounding country, the condition and size of its channel or channels, the situation of the property damaged with reference to the stream, the natural flow of the waters, the manner of constructing the flume or bulkheads and size thereof, in view of these conditions and all other facts and circumstances known, or which should have been known, considering the conditions at the time, to an ordinarily prudent man, contemplating such construction,—and from them decide whether the defendants used ordinary care in such [346] construction.

The channel in which a stream flows is a component part of a stream itself and one owner cannot change the flow to another channel to the injury of a lower or another property along the stream without being liable for the damage. One who undertakes to change the channel of a stream

must see that the capacity of the new channel is, in all respects, equal to that of the old channel or channels, and he will be liable for injury caused by the overflow of the stream in case this is not so; and, although the size of the new channel may be even greater than that of the old channel or channels, this will not relieve one from liability for changing it if it is constructed in such a manner as to be more liable to overflow. So, if you find and believe that the change made in the channel of Gold Creek by the defendants rendered it more likely for the waters thereof to overflow and damage the plaintiff's property than when the channel was in its natural condition, and that this change did in fact cause the waters to overflow and damage the plaintiffs' property,—then the defendants are liable and your verdict should be for whatever damages you may find they have sustained. It is admitted that defendants, for their own purposes, erected certain structures along the bank of Gold Creek for the purpose of confining this channel and the waters therein. In doing this, they were bound to provide a channel of as great a capacity to obtain and carry off the flow of waters as the natural channel or channels which they replaced; and they were also bound to exercise due care in the planning and construction of the artificial channel so as not to lessen its capacity. So, if you find and believe, that in the planning and construction of the artificial channel by the defendants, they narrowed such channel at or near its mouth, and that this made it liable to become choked during times

of flood water and that it did in fact, become choked because of such flood on the [347] day that this property was destroyed; and that the defendants knew, or by the exercise of ordinary care, should have known the effect of such narrowing, and this manner of planning and construction was a direct cause of the choking up of said channel and the cause of the breaking and overflowing of the bulkheads which caused the damage and destruction of the plaintiffs' property, then the defendants are liable and your verdict should be for the plaintiffs.

If the defendants knew, or by the exercise of ordinary care, should have known that there were times of flood in Gold Creek when the capacity of the channels of the creek in its natural condition was taxed to its full capacity to carry the flood waters, then it was the defendants' duty, when they undertook to put in a bulkhead and build the artificial channel which they put in and built, to give to such new channel a capacity at least equal to that of the natural channels which it was to replace, and if they failed in this respect, and that failure was the direct and proximate cause of the destruction of the plaintiffs' property, then it will be your duty to find for the plaintiffs.

If the bulkheads and flume or artificial channel put in by the defendants diverted and confined the waters of Gold Creek, and by reason of diversion and confinement as alleged by the plaintiff, was the proximate cause of the destruction of the plaintiffs' property, then the defendants are liable. By proxi-



mate cause is meant the efficient, actual cause. Of course the bulkheads of themselves would not cause the damage; but if the bulkheads and flume or artificial channel so controlled and affected the flood waters on September 26, 1918, as to cause said waters to destroy plaintiffs' property, then they were in law the proximate cause of the destruction, notwithstanding the fact that such destruction was immediately produced by the flood and high water." [348]

And the Court further instructed the jury as follows:

"A person obstructing or diverting a natural watercourse from its channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for, floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like conditions and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary; yet, if it be such as has occasionally occurred, although it may be at irregu-



lar intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated. An extraordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight." [349]

To which instructions the plaintiffs then and there excepted. And the Court further instructed the jury as follows:

"It is the duty of a person diverting or obstructing the natural channel of a stream to provide, not only for the normal flow thereof, but for such floods or freshets as may occasionally occur. Hence, if you find from the evidence that the flood of September 26, 1918, referred to in the pleadings and evidence in this case was such as in the memory or experience of residents in the vicinity thereof had occasionally occurred before, or could be expected to occur again, even though at irregular and long intervals of time, then such a flood would not be considered such 'an act of God' or unprecedented flood as would relieve the person obstructing or di-

verting the normal flow of the waters of the stream from liability for damages caused by such obstruction or diversion.

The defendants, in the case at bar, claim that the damages to the plaintiffs' house and lot was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.

It is for you, Gentlemen of the Jury, to decide whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated.

I charge you further that where rains are so unprecedented and the flood caused thereby so extraordinary that it is, in legal contemplation, the act of God, and the one obstructing the natural course can not be held liable,—it must appear, in order to give immunity under that rule, that the act of God was not only the proximate cause of the damage, but the [350] sole cause of the damage. It must appear, before the defence of an act of God can be available, that there was an entire exclusion of human agency from the cause that produced the injury, and an occurrence which is produced partially by the intervention of human agencies is not an act of God within the meaning of the law. Therefore, although you find that the flood of September

26, 1918, was an extraordinary flood, amounting to an act of God which could not have been foreseen or anticipated, as I have heretofore defined to you, yet, if you find that the negligent construction by the defendants of the bulkhead or flume contributed to the injury complained of by the plaintiffs, then the act of God was a remote cause, and the construction of the flume or bulkhead was the proximate cause of the damage and your verdict should be for the plaintiffs. In other words, where an injury is the combined result of the negligence of the defendant and of an accident for which the defendant is not responsible, the defendant must pay the damages, unless the damage would have happened if he had not been negligent.

A person owning land through which a stream flows has a right to build a bulkhead on the banks of the stream to confine its course for the purpose of protecting his own property or that of others and for any other lawful purpose, provided he does so with due care and such as a reasonably prudent man would use; and if he exercises that degree of care which a reasonably prudent man would exercise, having in view all the circumstances, such as climatic conditions, the topography of the country and periods of ordinary high water in the stream, he will not be liable for damages to another caused solely by an extraordinary or unprecedented flood.

If the flood of September 26, 1918, was such that the damage would have been caused to plaintiff's property if the bulkheads had not been constructed by the defendants, the question of whether the flood

was extraordinary or unprecedented would be immaterial, and your verdict must be for the defendants. [351] In other words, if you find that if the defendants had not constructed the bulkheads at all, and that the flood was of such character that the damage would have been done by the waters of Gold Creek and the debris and timbers, etc., that it carried down, you need not determine whether the flood was ordinary or extraordinary, and you must find for the defendants. If it becomes necessary for you to determine whether the flood was ordinary or extraordinary, you are to take into consideration all the evidence on this point; and you may consider the weather records; the stream flow measurements, as far as they go, and all the testimony of the witnesses who have testified from their memories of flood conditions.

The plaintiffs seek, in this case, to recover damages from the defendants because they allege that the defendants were negligent in the construction of a bulkhead on the banks of Gold Creek. You are instructed the burden is on the plaintiffs to prove to your satisfaction, by a preponderance of the evidence, that the defendants were in fact negligent in the respect alleged. The plaintiffs must establish, by a preponderance of the evidence, all material allegations of the complaint, and if they have not done so, your verdict must be for the defendants. You are instructed that the defendants had a right to construct the bulkhead in question for lawful purposes, provided that they used due care, such as an ordinarily prudent man would use, in view of all



the circumstances attending the case. In the construction of the bulkhead, the defendants were not bound to make it absolutely safe at all hazards; they were not bound to use the highest possible degree of care, nor to guarantee to every one that the bulkheads were safe, but they were required to use the degree of care that a reasonably prudent and careful man would use, having in mind all the facts and circumstances and the climatic conditions, and all knowledge obtainable from experience with flood conditions of the stream. [352]

You are the sole judge of the credibility of the witnesses and of the weight of the evidence and other facts. It is your right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witnesses are more worthy of credit and to give weight accordingly. In determining the weight to be given the testimony of witnesses, you are authorized to consider their relationship, if any, to the parties, their interest, if any, in the outcome of the suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of obtaining information and the reasonableness of the stories told by them, and to give weight accordingly. The power to judge of the effect and value of evidence is not an arbitrary power, but one to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your mind against a less



number or against presumption or other evidence satisfying your minds. A witness wilfully false in one part of his testimony may be distrusted in others.

In this case, as in all civil cases, the affirmative of the issue must be proved, and when the evidence is contradictory, the findings should be according to the preponderance of the evidence; and evidence should be estimated, not only by its intrinsic weight, but according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered, when it appears stronger and more satisfactory evidence was within the power of the party to produce, that evidence should be viewed with distrust.

You should decide this case upon all the evidence and the instructions of the court, not taking into consideration any extraneous matters. You are to decide it without fear, [353] favor or sympathy for either party; nor should bias or friendship to either party to the action in any way influence you.

If you find for the plaintiffs, under the instructions and from the evidence, you will assess the plaintiffs' damages at the sum as you will find they have been actually injured by the destruction of their property, and in arriving at that sum, you will allow them the reasonable market value for the lot, house and its contents. By 'reasonable market value' is meant what the plaintiffs could have realized by a sale of their property at or near the time of its destruction,—not what it would bring at a

forced sale and not what it would bring from some one especially desirous of owning it, but what would have been realized from it if it had been placed on the market and sold at or near the time of its destruction. In arriving at a fair market value, you must take into consideration the evidence as to the cost of the property; its condition at the time of its destruction, and all other facts and circumstances, as far as they are shown by the evidence, which would have a bearing on the question of what was the fair and reasonable market value on the day the property was destroyed.

I hand you two forms of verdict,—one for the plaintiff, and one for the defendant.

When you have retired to your jury-room, you will elect one of your number foreman, and after you have arrived at a verdict, fill out one of these forms and return the same into open court."

And the above and foregoing were all the instructions given by the Court.

And because the above and foregoing matters do not appear of record, I, Thomas M. Reed, the Judge before whom said cause was tried, do hereby certify that the above and foregoing is a full, true, and correct bill of exceptions, and contains [354] all the evidence produced on the trial except that relating solely to the value of the property destroyed, which is admitted as immaterial in the Appellate Court, and excepting the exhibits, the originals of which are ordered transmitted with the transcript of the record; and I further order the said Bill of Exceptions to be filed and made a part of the record herein.

Done this the 2d day of January, 1923, during the term at which said cause was tried.

THOS. M. REED,  
Judge.

Filed in the District Court, District of Alaska, First Division. Jan. 2. John H. Dunn, Clerk. By W. B. King, Deputy. [355]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

### **Assignments of Error.**

Now come the plaintiff in the above-entitled and numbered cause, and assign the following errors committed by the Court on the trial, and in the rendition of the judgment in said cause, to wit:

#### **I.**

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

“Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it

was their duty to see that the new channel which they provided as a substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs' property was one which might reasonably have been anticipated; that plaintiffs' property was situated on high ground far above the reach of flood waters from Gold Creek; and that because of the construction of said flume and bulkheads in the manner and of the capacity they were, the flood waters were directed against the plaintiffs' property and caused the damages [356] complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given.

In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you should take into consideration the evidence as to the cost thereof, its condition of repair, and all other circumstances in evidence bearing upon that question. In addition to such sum as you may find for the



damages to the house and lot, you will add the fair market value of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

## II.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an 'act of God' as that term is used in the law."

## III.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If the building of the bulkhead and flume by the defendants caused the damage to the plaintiffs' property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damages to the plaintiffs' property; but the flume and the bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the [357] bulkheads and flume so controlled and influenced the flow of the flood waters and to deflect the current against plaintiffs' lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building



of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damage would not have occurred? If it was, the defendants are liable. In deciding this question, you should bear in mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs' house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of floods and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook to interfere with the natural channel and course of the stream."

#### IV.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs' lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide

such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs' property, but that because of the building of the cribbed or [358] bulkhead channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural channel and the current driven against the plaintiffs' property, thereby undermining it, and washing it away, you will find for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26th, 1918, was the highest ever known in the creek or not. To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

V.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make

such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to fully carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all the natural channels it was to replace; if he would builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damages caused by such negligence." [359]

## VI.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence that on September 26th, 1918, timbers and logs washed out of the bulkheaded or cribbed channel *build* by defendants at a point approximately the upper end of plaintiffs' lot, and such timbers or logs lodged in the channel of the creek causing a dam, or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs' property, then I instruct you to find for the plaintiffs."

## VII.

The Court erred in instructing the jury as follows:

“Naturally two questions arise under the issues and admitted facts as I have detailed you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven; for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, [360] then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not actionable.

Now, Gentlemen, all acts of negligence are not actionable, While it is a canon of the law that a man should so use his own as not to injure



another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of the act, in the light of attending circumstances, is not actionable. To constitute approximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one which, in the light of attending circumstances, an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. A natural consequence of an act is a consequence which ordinarily follows from it, the re-



sult of which may be reasonably anticipated from it. A probable consequence is [361] one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you will find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the construction of the bulkhead or flume, then the defendants are liable. and your verdict should be for the plaintiffs.”

#### VIII.

The Court erred in instructing the jury as follows:

“A person obstructing or diverting a natural watercourse from its natural channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like condi-

tions, and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary, yet, if it be such as has occasionally occurred although it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing [362] or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated.

An ordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."

#### IX.

The Court erred in instructing the jury as follows:

"The defendants, in the case at bar, claim that the damage to the plaintiffs' house and lot

was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight. It is for you gentlemen of the jury to determine whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated."

And for said errors and others manifest of record, plaintiffs pray that the judgment of the lower Court be reversed and the cause remanded for a new trial, and that on such new trial the Court below be commanded to instruct the jury to return a verdict for the plaintiffs for such damages as they may find, and for other and further directions as to [363] this Court may seem proper.

JAMES WICKERSHAM and

J. H. COBB,

Attorneys for Plaintiffs in Error,

Filed in the District Court, District of Alaska,  
First Division. Jan. 3, 1923. John H. Dunn, Clerk.  
By W. B. King, Deputy. [364]

In the District Court for the District of Alaska,  
Division Number One, at Juneau

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

**Writ of Error.**

United States of America,—ss.

The President of the United States to the Judge of  
the District Court of the United States for  
Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in  
the rendition of a judgment of a plea which is before  
you, wherein A. Eikland and O. Eikland are plain-  
tiffs and W. W. Casey, Henry Shattuck and Allen  
Shattuck are defendants, a manifest error hath  
happened to the great damage of the said A. Eik-  
land and O. Eikland as by that petition doth ap-  
pear.

We being willing that error, if any hath hap-  
pened, should be duly corrected, and speedy justice  
done to the parties in that behalf, do command you,  
if judgment be therein given, that then under your  
seal, distinctly and openly, you send the record and  
proceedings aforesaid, with all things pertaining  
thereto, to the United States Circuit Court of Ap-  
peals for the Ninth Circuit at the City of San Fran-  
cisco, State of California, so that you have the same

before said Court on or before thirty days from the date of this writ, so that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws [365] and customs of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau, Alaska, this the 3d day of January, 1923.

[Seal]

JOHN H. DUNN,  
Clerk.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk. By W. B. King, Deputy.

Allowed this the 3d day of January, 1923.

THOS. M. REED,  
Judge.

Filed and served by lodging a true Copy with the Clerk of the District Court. [366]



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, A. Eikland and O. Eikland, as principals, and George Marshall, and L. F. Morris, as sureties, hereby acknowledge ourselves to be indebted and bound to pay to W. W. Casey, Henry Shattuck and Allen Shattuck the sum of Two Hundred and Fifty Dollars, good and lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, however, that whereas the above bound A. Eikland and O. Eikland have sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment rendered in said cause on the 18th day of November, 1922.

Now, if the said A. Eikland and O. Eikland shall prosecute their writ of error to effect and pay all such costs and damages as may be awarded against

them if they fail to make their plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

WITNESS our hands this the 3d day of January, 1923.

A. EIKLAND.

O. EIKLAND.

By J. H. COBB,

Their Attorney of Record. [367]

GEORGE MARSHALL,

L. F. MORRIS.

Approved as to form and sufficiency of sureties this the 3d day of January, 1923.

THOS. M. REED,

Judge.

O. K.—H. L. FAULKNER,

Atty. For Defendants.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk.  
By W. B. King, Deputy. [368]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States to W. W. Casey,  
Henry Shattuck and Allen Shattuck and H. L.  
Faulkner, Their Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error lodged in the clerk's office for the District for Alaska, Division Number One, in a cause wherein *A. Eikland and O. Eikland and* plaintiffs in error and you are defendants in error, then and there to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 3d day of January, 1923, and of the Independence of the United States the one hundred and forty-eighth.

THOS. M. REED,  
Judge

Service of the above and foregoing citation on writ of error is admitted this the 3d day of January, 1923.

H. L. FAULKNER,  
Attorney for Defendants in Error.

Filed in the District Court, District of Alaska,  
First Division. Jan. 4, 1923. John H. Dunn,  
Clerk. By W. B. King, Deputy. [369]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

**Order Directing Transmission of Original Exhibits.**

It being impossible to copy all the hereinafter  
named-exhibits, and the same being deemed neces-  
sary on the hearing of this case in the Appellate  
Court:

IT IS ORDERED that the clerk of this court  
transmit, with the transcript of the record herein,  
to the Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit, at San Francisco,  
California, the following exhibits, to wit:

**PLAINTIFF'S EXHIBITS.**

- A. Tracing of Casey-Shattuck Addition.
- B. Cross-section of cribbed channel.
- C. Photo of Gastineau Channel and Juneau,  
showing washed out area in red, taken be-  
fore the flood.
- D. Photo showing Gold Creek in Casey-Shat-  
tuck Addition after flood, showing break

in bulkhead through which waters escaped to eastward and washed *our* Eikland's and other houses, and showing stream in new channel.

E. List of contents of Eikland house.

F. Blue-print of Casey-Shattuck Addition.

[370]

#### DEFENDANTS' EXHIBITS.

No. 1. Large photo showing stream after flood, flowing in old and new channels, about the same as Plaintiffs' Exhibit "D."

No. 2. Photo showing logs jammed in cribbed channel just north of Willoughby Ave. Bridge and back of houses along Willoughby.

No. 3. Photo taken in winter from upper Gold Creek bridge, looking down Gold Creek, toward Northern Laundry, and showing northerly end of bulkhead on west side of stream, washed out area adjacent to laundry.

No. 4. Photo taken after flood, or while flood was subsiding, showing jammed cribbed channel, with waters backed up in it. Photo taken east of channel and just north of Willoughby Ave. bridge and shows hospital with water running around, in front and beyond it.

No. 5. Photo taken after flood from point apparently just to the west of where Eikland's house stood on Ninth Street, showing washed out area north thereof, with



the new channel in the immediate foreground, part of sidewalk on the north side of Ninth Street and picket fence apparently on Eikland's lot. Taken in winter.

No. 6. Certificate of Department of Agriculture to statement showing greatest precipitation during 24-hour periods from 1909 to 1918.

No. 7. Photo taken evidently from Willoughby Ave. [371] looking north, showing log jam, etc., in cribbed channel. Photo taken 11-9-22 by L. V. Winter.

No. 8. Photo taken on same date, looking south-east, showing log jam under Willoughby Ave. bridge.

Dated this the 3d day of January, 1923.

THOS. M. REED,  
Judge.

O. K.—H. L. FAULKNER,  
Atty. for Defendants.

Filed in the District Court, District of Alaska, First Division. Jan. 3, 1923. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. S, page 17. [372]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1787—A.

A. EIKLAND et al.,

Plaintiffs,

vs.

W. W. CASEY et al.,

Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

Sir: You will please make up the transcript of the record in the above-entitled and numbered cause, and include therein the following papers, to wit:

1. Amended complaint, filed June 3d, 1921.
2. Answer to amended complaint, filed Oct. 15, 1921.
3. Reply, filed Oct. 20th, 1921.
4. Judgment, entered Nov. 18, 1921.
5. Bill of exceptions.
6. Assignment of errors.
7. Writ of error.
8. Bond on writ of error.
9. Citation.
10. Order directing transmission of exhibits to Appellate Court.
11. This praecipe.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Ap-

peals for the Ninth Circuit, and transmitted to the clerk of said Court at San Francisco, California.

J. H. COBB,

Attorney for Defendants and Plaintiffs in Error.

Filed in the District Court, District of Alaska,  
First Division. Jan. 3, 1923. John H. Dunn,  
Clerk. By W. B. King, Deputy. [373]

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In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

United States of America,  
District of Alaska,  
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 373 pages of typewritten matter, numbered from one to 373, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe of the plaintiffs in error, on file herein and made a part hereof, in the cause wherein A. Eikland and O. Eikland are plaintiffs in error and W. W. Casey, Henry Shattuck and Allen Shattuck are defendants in error, No. 1787—A, as the same appears of record and on file in my office, and that the said record is by virtue of a writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to One Hundred Sixty-eight Dollars (\$168.00), has been paid to me by the attorney for plaintiffs in error.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled Court this 10th day of January, 1923.

[Seal]

JOHN H. DUNN,  
Clerk.

By \_\_\_\_\_  
Deputy.

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[Endorsed]: No. 3974. United States Circuit Court of Appeals for the Ninth Circuit. A. Eikland and O. Eikland, Plaintiffs in Error, vs. W. W. Casey, Henry Shattuck and Allen Shattuck, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed January 22, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

No. 3974.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

A. EIKLAND et al.,

Plaintiffs in Error.

vs.

W. W. CASEY et al.,

Defendants in Error.

**Stipulation and Order Omitting Original Exhibits  
from Printed Transcript of Record.**

It is hereby stipulated by and between the parties hereto that the Clerk of the Appellate Court need not print or have reproduced the original exhibits ordered sent up with the record but that such exhibits shall be used and considered by the Court upon the hearing the same as if printed.

This stipulation is made subject to the approval of the Court.

J. H. COBB,

Attorney for Plaintiffs in Error.

H. L. FAULKNER,

Attorney for Defendants in Error.

Dated: San Francisco, California, January 31,  
1923.

So ordered:

WM. W. MORROW,

United States Circuit Judge.

[Endorsed]: Stipulation and Order Omitting Original Exhibits from Printed Transcript of Record. Filed February 1, 1923. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.





IN THE

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**United States  
Circuit Court of Appeals**

**For the Ninth Circuit**

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A. EIKLAND and O. EIKLAND,  
Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,  
Defendants in Error.

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Upon Writ of Error to the District Court for Alaska,  
Division Number One.

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J. H. COBB,  
Attorney for Plaintiffs in Error.



IN THE  
**United States**  
**Circuit Court of Appeals**  
For the Ninth Circuit

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A. EIKLAND and O. EIKLAND,  
Plaintiffs in Error,  
vs.  
W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,  
Defendants in Error.

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Upon Writ of Error to the District Court for Alaska,  
Division Number One.

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**Statement of the Case.**

On a former Writ of Error, a judgment in favor of defendants in error (also defendants in the court below) was reversed for misdirections to the jury. (266 Fed. 821.) A petition for certiorari was denied by the Supreme Court, and upon the coming down of the mandate, the case was again tried to a jury and resulted in a verdict and judgment for defendants. Upon the last trial there were no other or additional facts in evidence. Defendants introduced some other and additional witnesses, but their testimony was merely cumulative; the material and ultimate facts about which there was really little dispute, were the same on both trials. These facts are clearly, accurately, and sufficiently stated by this court, as follows:

“Action to recover damages for causing destruction of plaintiffs’ property by flood waters. The de-

defendants Casey and others, owners of land bordering upon Gastineau Channel at the mouth of Gold Creek, in 1913 sold to the plaintiffs a lot. Gold Creek flows from the mountain range east of Juneau, in part through a canyon, out of which it flows near the boundary of the Casey-Shattuck land, and thence across such land into Gastineau Channel. Plaintiffs' lot was on the south side of the stream, and from the point where the stream emerges from the canyon to a point some distance below plaintiffs' lot the creek was confined by high banks, but a short distance below plaintiffs' lot the creek at times overflowed the banks and spread over part of the Casey-Shattuck lands, and allowed a free outlet of the waters to the channel.

"After the plaintiffs had built a house and improved their property, defendants built a dam or bulkhead across the creek at a point approximately opposite the plaintiffs' lot, and from the dam, and from a point opposite and across the stream, constructed bulkheads of logs and stone to Gastineau Channel at a point to the southeast, thus changing the course of the stream, and deflecting it to the southeast in a curve around the west and south sides of plaintiffs' lots. It was alleged that the channel thus constructed was sufficient to carry the water away at ordinary stages of the stream, but was wholly insufficient at times of flood, such as ordinarily occurred at times of heavy rains, so that the stream as dammed and changed in its course became a danger to plaintiffs' property of which defendants were fully advised. It was also averred that on September 26, 1918, there occurred one of the usual periodical heavy rains to which the vicinity was subject, and which caused the water of Gold Creek to rise and pour out of the canyon onto the Casey-Shat-



tuck lands, and that the waters, unable to flow across the flat in their usual and natural course, because of the dam, and being deflected thereby, and the new channel being insufficient to confine and carry off the water, the flood water was deflected, and impinged against plaintiffs' property, and washed it away, and washed the earth and soil upon the lot itself, so that a new and deep channel thereafter occupied the space formerly occupied by the lot and house; that the damage and destruction was caused solely by the construction of the dam and bulkheads.

"The answer affirmatively pleaded that the flood and rains of September 26th were unprecedented and extraordinary, and such as could not have been foreseen by the defendants or anyone else, and that the damage was due solely to an act of God. Issue was taken with these affirmative allegations. The case was tried to a jury, and verdict rendered for defendants.

"The evidence showed that the defendants constructed bulkheads across Gold Creek, and thus dammed the same and diverted it from its natural bed, and forced it into an artificial channel, that the original natural channel before diversion had a relative capacity larger than that of the artificial channel, and that the original channel on a cross-section measurement had an area of 230 square feet, while the new channel on a cross-section measurement had but 150 square feet." (266 Fed. 821.)

Errors assigned are to the refusal of the court to give certain instructions requested, and the giving of instructions which this court had held on a former hearing here, to be erroneous, and are as follows:

## Assignments of Error.

### I.

“The court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

“Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it was their duty to see that the new channel which they provided as substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs’ property was one which might reasonably have been anticipated; that plaintiffs’ property was situated on high ground far above the reach of flood waters from Gold Creek; and that because of the construction of said flume and bulkheads in the manner and of the capacity they were, the flood waters were directed against the plaintiffs’ property and caused the damages complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given.

“In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you should take into consideration the evidence as to the cost thereof, its condition of repair, and all other cir-

cumstances in evidence bearing upon that question. In addition to such sum as you may find for the damages to the house and lot, you will add the fair market value of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

## II.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an act of God, as that term is used in the law."

## III.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If the building of the bulkheads and flume by the defendants caused the damage to the plaintiffs' property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damages to the plaintiffs' property; but the flume and the bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the bulkheads and flume so controlled and influenced the flow of the flood waters as to deflect the current against plaintiffs' lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damage would not have occurred? If it was, the defendants are liable. In deciding this question, you should bear in

mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs' house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of flood and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook to interfere with the natural channel and course of the stream."

#### IV.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs' lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs' property, but that because of the building of the cribbed or bulk-headed channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural channel, and the current driven against the plaintiff's property, thereby undermining it, and washing it away, you will find



for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26th, 1918, was the highest ever known in the creek or not. To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would be the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

#### V.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to fully carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all the natural channels it was to replace; if he who builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damages caused by such negligence."

#### VI.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence that on September 26th, 1918, timbers and logs washed out of the bulkheaded or cribbed channel built by defendants at a point approximately opposite the



upper end of plaintiffs' lot, and such timbers or logs lodged in the channel of the creek causing a dam or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs' property, then I instruct you to find for the plaintiffs."

## VII.

The Court erred in instructing the jury as follows:

"Naturally two questions arise under the issues and admitted facts as I have detailed to you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven; for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not actionable.

"Now, gentlemen, all acts of negligence are not

actionable. While it is a canon of the law that a man should so use his own as not to injure another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of the act, in the light of attending circumstances, is not actionable. To constitute proximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one which, in the light of attending circumstances an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. A natural consequence of an act is a consequence which ordinarily follows from it, the result of which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed

to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you will find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the construction of the bulkhead or flume, then the defendants are liable, and your verdict should be for the plaintiffs.”

### VIII.

The Court erred in instructing the jury as follows:

“A person obstructing or diverting a natural water-course from its natural channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for, floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like conditions, and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary; yet, if it be such as has occasionally occurred, although it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordi-

nary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated.

“An extraordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.”

### IX.

The Court erred in instructing the jury as follows:

“The defendants, in the case at bar, claim that the damage to the plaintiffs’ house and lot was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight. It is for you gentlemen of the jury to determine whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated.” (Rec. 395-405.)

### Argument.

There are two controlling questions raised by these assignments. First: the error of the Court in submitting to the jury the defence of the Act of God; and Second: the refusal to instruct the jury to find for the plaintiffs. We will consider them in this order:

FIRST: The Defence of the Act of God. (Assignments II, VII, VIII and IX.)

In the opinion in this case 266 Fed. 821, it was said:



“There is no evidence in the present case that the flood of September 26th, 1918, was of such a character that it should not have been anticipated in the exercise of reasonable care and prudence.” (p. 823.) And again: “The flood in the present case was not an ‘unexplainable visitation.’ It was caused by no cloud-burst or other catastrophic phenomenon, so as to be classed as an Act of God. It was caused solely by a heavy downfall of rain at a time when heavy rains were to be expected.” (Bottom pp. 823-824.)

The evidence as to the character and extent of the flood was practically the same on the last trial as on the former, concerning which the above language was used. Although the defendants called other and additional witnesses on this point their testimony was the same as that of the witnesses examined on the first trial, and only confirmed what this Court had already decided. A reference to the testimony will make this perfectly clear.

Canfield’s testimony is identical with that given on the former trial, being read from the record by stipulation. (Rec. pp. 354-8.) He was the government agent in charge of collecting data on stream flow. His instruments set in Gold Creek in the Canyon a short distance above the Cosey-Shattuck addition showed a maximum flow at the peak of the flood of 2600 cubic feet per second, and a total rise of the stream of 6.81 feet. (p. 355.) The other witnesses on this point,—the character and extent of the flood waters,—were Geo. T. Jackson, Allen Shattuck, Chas. Goldstein, W. Layton, Susie Michaelson, Mrs. Johnson, W. W. Casey, R. G. Day, H. T. Tripp, E. Gastoguy, Geo. Oswell, Geo. R. Dull, John Reck, B. M. Behrends, M. B. Summers, J. C. McBride, H. J. Lucas, L. V. Winter, J. C. Hayes and Gust Anderson. These all testified on the former trial, except Gold-



stein, Michaelson, Mrs. Johnson, R. G. Day, Geo. R. Dull, John Reck, J. C. McBride, H. J. Lucas, L. V. Winter and Gust Anderson. But the testimony of these ten merely showed the *same facts* as testified to by the other witnesses both on the former trial and on this, namely, that there was a heavy rainfall, beginning early in the morning; the creek began rising about 8 a. m., reached its peak about 1 p. m., and then gradually subsided. There was not a word in the evidence of any one of them tending to show facts that would raise the issue of an Act of God.

Mr. Goldstein is a merchant of long residence in Juneau, called by the defendants (Rec. p. 179), having testified that he was out on the flats on Sept. 26, 1918, was asked:

“Q. You observed the conditions out there that day?

A. Yes, to a certain extent.

Q. Now, did you observe the rainfall that day?

A. Yes.

Q. From your observations, had you ever experienced a greater rainfall in Juneau than there was that day?

A. I don't think so.

Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. I couldn't say that either.

Q. Did you observe the flood waters in the creek that day?

A. I did.

Q. Did you ever see anything as high as that before?

A. No, sir.” (Rec. p. 180.)

On cross-examination the witness stated he had never before seen the creek in high water since the construction of the flume (180-1). He therefore could not compare it with the flood and high water of October, 1913, which A. Eikland (Rec. pp. 46 and 58-9) had testified raised the creek as high if not higher than the flood of 1918. Indeed, so far as his testimony showed, the flood of Sept. 26, 1918, was the only high water Goldstein had ever noticed, which was natural, as that was the first high water after the settlement of the flats, when damage could have been done to property.

Mrs. Michaelson was an Indian woman who had to testify through an interpreter. (Rec. pp. 190-6.) She had never seen the water as high in Gold Creek as on September 26th, 1918. But she also said (p. 196) that she had never before seen Gold Creek except when the water was running in the main channel. If this was true, the high water of September 26th was the only one she ever saw. She also said she couldn't remember how many times she had seen high water—"It never entered my mind." (195.)

Mrs. Johnson was also an Indian woman, who testified through an interpreter (Rec. 196). She was not in Juneau on September 26, 1918, and gave no testimony on this point.

R. G. Day had only been in Juneau since 1912. He testified that the flood of Sept. 26th, 1918, was the highest he ever saw in Gold Creek. But on cross-examination it developed that he was not in Juneau in October 1913, and so missed seeing the only other high water that had occurred since his arrival, except the comparatively small one of 1915. (Rec. 266.)

Geo. R. Dull (Rec. 298) had lived in Juneau over 25 years; placer mined on Gold Creek one summer, and had charge of the Juneau City Water Works for

some six years. He had never seen as heavy a rainfall or as high water as there was on Sept. 26th, 1918. On cross-examination the witness stated he had never had any particular occasion to observe the height of the flood waters except when working for the Water Company. He didn't particularly recall the flood of 1913, and didn't have that in mind when he stated that the flood of 1918 was the highest. Didn't remember seeing any high water then. (305.)

John Reck (Rec. 305) is a banker and butcher of 24 years residence in Juneau. The flood of Sept. 26th was the highest water he ever saw in Gold Creek. On cross-examination he said he did not recall all the times of high water he had seen, and he had been absent at times and he didn't know about the high water that might have occurred in his absence.

J. C. McBride (Rec. 324), Collector of Customs, has lived in Juneau since 1904. Observed the weather conditions and flood waters on Sept. 26th, 1918. It was the largest rainfall and highest water he had ever observed since being here. On cross-examination he said he had perhaps observed high water half a dozen times. He simply didn't recall any flood waters as high as on Sept. 26, 1918, but didn't recall seeing the high water of 1913 or 1915. He was simply using as a basis of comparison the fact that Gold Creek bridge was taken out, and he assumed it was carried out by high water, and not by having its abutments undermined.

H. J. Lucas (Rec. 329) had lived in Juneau over ten years; went out to the flats on Sept. 26th, 1918, in response to a fire alarm call, he being a member of the fire department, being asked:

“ Q. Within your residence in Juneau have you ever seen as high a period of water?

A. I don't believe I ever have.”

On cross-examination he said he came here in 1912 and did not go out to Gold Creek or observe the flood therein that occurred in Oct. 1913. There were no houses on the flats then.

L. V. Winter (Rec. p. 338) had lived in Juneau 22-1/2 years. Was not in Juneau on Sept. 26th, 1918, and gave no testimony as to the flood, but testified to certain slides that occurred carrying some houses on Swede Hill.

Gust Anderson (Rec. pp. 364-8) gave no testimony on this question, but merely testified to the shifting nature of the channel of Gold Creek across the delta, as he had observed it for many years.

These were all the new witnesses called, and we have gone through their testimony at some length to show that there was nothing to justify the Court below in disregarding the law of the case as laid down by this Court on the former Writ of Error. In that decision (266 Fed. p 823), this Court referred to the testimony of "Coggins, who had lived in Juneau 23 years, when asked whether he had ever seen freshets as high as that of 1918, answered, 'I could not say whether I did or not.' He testified further, he had seen other freshets and could not say whether they were as high as that of 1918. 'They might have been higher for all that I know.' Layton was asked whether within his memory of 30 years he had seen as great a rainfall, or as high water as on Sept. 26th, 1918. He answered: 'No, I don't think so.' Behrends, who had been 32 years at Juneau, said he thought the flood was the highest he had ever seen, he would not undertake to say positively that it was. The defendants are bound by this testimony which they themselves introduced. It is wholly insufficient to show that the flood was of an extent and character which the defendants were not bound to anticipate."



This language is fully as applicable to the present record as it was to the former. Take for instance the testimony of Goldstein: He had been in Juneau 37 years. When asked if he had ever experienced a greater rainfall than there was on Sept. 26th, 1918, answered: "I don't think so."

"Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. That I couldn't say either." (Rec. p. 180.)

"The defendants are bound by this testimony which they themselves introduced. It is wholly insufficient to show that the flood was of an extent and character which the defendants were not bound to anticipate." (266 Fed. 823.)

It was therefore manifest error for the Court to refuse as it did, (Rec. 371) the prayer of the plaintiffs for an instruction eliminating the defence of the Act of God; and in submitting that defence to the jury as it did in the instructions complained of in Assignments VII, VIII and IX, all of which were duly excepted to. (Rec. 384, 388.)

SECOND: *The Court should have granted the prayer of the plaintiffs to instruct the jury to find a verdict for the plaintiffs.* (Assignment I, Rec. 370 and 395.)

The defence of the Act of God being eliminated, the sole question under this assignment is, whether there was any evidence under the defendants' denials, or lack of evidence on the part of the plaintiffs, to establish conclusively as matter of law, the liability of the defendants. In other words, it is our contention that the undisputed *facts in evidence* rendered



the defendants liable as matter of law. From the pleadings the following facts are admitted: That in 1913 the defendants were the owners of a certain tract of land situated in the westerly part of the town of Juneau, and covering the flats bordering on Gastineau Channel, at the mouth of Gold Creek, and extending on both sides of the creek, which they subdivided into lots and blocks, and placed upon the market as the Casey-Shattuck Addition. In 1913 defendants sold Lot 6 in Block 209 in said Addition to plaintiffs. Gold Creek flows from the mountain range east of Juneau into Gastineau Channel across the Casey-Shattuck Addition. There are periods of flood in the stream; the lot sold plaintiffs was situated on the southeast side of the stream on high ground, far above any danger of floods from said stream during periods of high water; that on September 26th, 1918, plaintiff's property was damaged by a flood in said stream.

From the evidence the following facts were established without dispute: that in 1914 and 1915 defendants, from a point a little above plaintiff's property, constructed a bulkheaded channel, five feet deep and 30 feet wide, through the greater part of its course, but narrowing to 25 feet where it emptied into the sea. This bulkheaded, or artificial channel cut off the waters of the Creek from its main natural channel, and changed the course of the stream, and confined its waters in time of flood so they could not flow unimpeded through and across the delta and escape to the sea, as they did when the channel was in its natural condition. The bulkheads which confined the new channel were constructed of long logs, drift bolted together, and filled in behind with rock and sand. There were three eye-witnesses, two of them wholly disinterested, who described exactly how

plaintiffs' property was destroyed, namely: A. Eikland, E. R. Smith and C. W. Stearns. They all agree on the essential facts, that the waters of the Creek began rising early on the morning of September 26, 1918, that the bulkhead across the main channel of the Creek, just opposite and below plaintiff's property, held, and prevented the escape of the water down said channel; the water continued to rise, reaching its peak, (shown by the defendants to have been a total rise of 6.81 feet) about 2 p. m. Sometime about noon the bulkhead on the westerly side, that is across the stream from plaintiff's home, was washed out and some of the heavy logs of which it was built washed into the channel, became jammed, and forming a sort of wing-dam, diverted the force of the current to the easterly bank. These logs were still in the channel after the flood subsided, and are plainly shown in plaintiff's Exhibit D. Shortly after this occurred, the diverted current washed out the bulkhead on the easterly side of the Creek, and rapidly undercut and washed out the earth composing the high banks of the stream, until it reached and undermined and washed away plaintiff's property. *At no time did the water rise as high as the surface of plaintiff's lot. The destruction was caused solely by the diversion of the confined waters by the bulkheads against the property.* Not only is there no dispute as to these facts, *but the record shows that two of the defendants, W. W. Casey and Allen Shattuck, were themselves on the ground at the time, and neither of them denied the truth or accuracy of the facts testified to by Eikland, Smith and Stearns as to how the property was destroyed.* The trial court then should, upon proper request have treated these facts as established, and being established the defendants

were liable as matter of law. Under these facts no questions of negligence or want of negligence were involved. It was simply a case where the defendants, for their own purposes, had wilfully diverted the waters of a natural stream, so that they flowed upon the property of their neighbor and destroyed it.

This Court in 266 Fed. 823, quoting from the case of *Hartshorn vs. Chaddock*, 135 N. Y. 116, said: "Irrespective of any question of negligence or malice, a riparian owner, who by his wilful act diverts the waters of a stream from its accustomed channel, and causes them to flow upon the lands of his neighbor is liable for the resulting damages."

And your honors further said: "Answering the contention that the flood in question 'was so extraordinary and unusual as to be deemed an Act of God' the Court said: 'It is found that though the freshet was unusual, with respect to the volume of water, yet that similar ones, but of less power, have occurred in the past, and are likely to occur in the future'."

We respectfully but earnestly submit, then, that the request for the peremptory instruction should have been granted; that the lower court erred in refusing it, and in submitting to the jury in lieu thereof the question of the defendants negligence, or want of negligence as the sole criterion of the liability. For the lower court plainly told the jury (Rec. 381) that "The foundation for this action is the alleged negligence of the defendants in the construction of a so-called flume and series of bulkheads," etc.

### **Assignments III, IV, V, and VI.**

The instructions quoted in these Assignments relate to the same error; they were each duly requested (Rec. 372-375) and the refusal excepted to. These instructions present in varying aspects the question decided by this Court on the former Writ of Error,

which may be broadly stated as follows: One who for his own purposes diverts the waters of a stream from the natural channel or confines them in artificial banks, so as to thereby damage the property of another, is liable for such damages. No question of negligence need be, or is involved, unless it be said that the diversion itself, in such way that the stream is not as safe as before, is negligence. This rule is not only in accord with common sense, and natural justice, but as this Court pointed out, is sustained by abundant authority, and the better reason. At any rate it was "the law of the case" for the Court below. But that Court not only denied the requests for the instructions, but nowhere in the instructions given was any attention paid, apparently, to the decision of this Court.

We respectfully submit that the judgment below should be reversed, and remanded, with instructions to the Court below, that upon another trial if the evidence is substantially the same, the jury be instructed to return a verdict for the plaintiffs.

J. H. COBB,  
Attorney for Plaintiffs in Error.





No. 3974

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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A. EIKLAND and O. EIKLAND,

*Plaintiffs in Error,*

VS.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

*Defendants in Error.*

Upon Writ of Error to the District Court for Alaska,  
Division Number One.

**BRIEF FOR DEFENDANTS IN ERROR.**

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FILED  
MAY 21 1923  
R. D. MONKTON  
CLERK



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### Plaintiffs' Errors in Statement of the Case.

Instead of making a statement of *this* case, plaintiffs content themselves by quoting this court's statement of the facts on which it based its decision on the former writ of error herein, and by alleging that the issues and evidence herein are the same which then and there obtained. Their purpose in so doing is, of course, to lay a predicate for their contention that the decision on the former writ of error is conclusive in this writ of error.

It is not a fact that the issues are now the same as those on the former trial. On the contrary, the amended complaint is essentially different from the original complaint.

It is not a fact that an affirmative defense is pleaded—on the contrary, the answer is a denial only.

It is not a fact that the evidence at this trial is no stronger than the evidence at that trial—on the contrary, it is much stronger.

It is not a fact that the lower court gave any instruction which this court had held to be erroneous (Plaintiffs' Brief, p. 3, bottom), or that the lower court "paid no attention to the decision of this court" (Plaintiffs' Brief, p. 21), or that the instructions at this trial were the same as the instructions at that trial.

It is not a fact that defendants built a dam or bulkhead across the creek, or that they changed the course of the stream or deflected it, or that the cribbed channel was of less capacity than the original channel. The record shows that each and all of said points were in dispute and that the evidence thereon was conflicting.

It is not a fact that it is admitted in the pleadings that plaintiffs' lot was situated "far above any danger of floods from said stream during periods of high water" (Plaintiffs' Brief, p. 18, end of

1st paragraph). On the contrary, what was admitted was this:

“Admit that said lot was far above any danger of floods from said stream during periods of *ordinary* high water in said stream” (Tr. p. 8, bottom). (*Italics ours.*)

It is not a fact that the *evidence establishes without dispute* that “This bulkheaded or artificial channel cut off the waters of the creek from its main natural channel”, or changed the course of the stream (Plaintiffs’ Brief, p. 18, last paragraph). On the contrary, the evidence on that point was contradictory.

*Defendants* wish to accentuate the fact that the evidence shows that they were the owners of the land through which the creek flowed, and that plaintiffs were not riparian owners.

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### **Plan of This Brief.**

There are nine Assignments of Error; the first two relate to instructions requested and refused, and the remainder relate to instructions given.

Plaintiffs’ argument and brief concede that the validity of Assignments Nos. III, IV, V, VI, VII, VIII and IX is directly and entirely dependent upon the determination of the validity of Assignments I and II (Plaintiffs’ Brief, p. 11, bottom; p. 20, bottom).



This brief will, therefore, be devoted to a discussion of Assignments Nos. I and II only; and as Assignment No. I could not be sustained unless Assignment No. II is valid, the latter assignment (being the storm center of the case) will be first adverted to.

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**ASSIGNMENT No. II (Tr. p. 397).**

“That the court erred in refusing the prayer of the plaintiff to instruct the jury as follows: ‘There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs’ property was caused by an act of God, as that term is used in the law’.”

We think that the very indefiniteness of this request precludes the non-giving of the requested instruction from being error, for the term “Act of God” is used in the law in a great variety of senses, and it is not apparent to which sense plaintiffs refer. If, however, the meaning of the requested instruction is as if it were expressed thus: “There is not sufficient evidence before you to justify a finding that the flood in question here was an extraordinary flood, a flood not reasonably to be expected by the ordinarily prudent man”, none the less was it not error to have refused it.

In considering this assignment, we purpose (1). To treat this writ of error as of “first impression”; (2) To combat the contention that the decision on the former writ of error is conclusive to the effect

that it was error to refuse to give the requested instruction set out above.

In treating the case as of “first impression”, we will discuss the pleadings *as they now are*, and the evidence *here* presented and the law applicable. We maintain that the law is that the owner of land through which a stream flows has the right to interfere with the flow or to lessen the channel capacity, *provided that in so doing he is not guilty of negligence*; that failure to anticipate and guard against an ordinary flood is negligence; that failure to anticipate and guard against an extraordinary flood is *non-negligence*; that, the action being founded on negligence, the burden is on plaintiffs to prove negligence, not on defendants to prove non-negligence; that whether defendants do or do not introduce any evidence of *non-negligence*, plaintiffs cannot recover unless on the whole case “negligence” is made out; that the term “Act of God” as used in this case means only an extraordinary flood—a “not to be expected” event—an “unanticipatable” event, and that the evidence on the part of defendants as to the nature of the flood as being “ordinary” or “extraordinary”, is evidence tending only to negative the charge of want of ordinary care; and that, therefore (because the question as to whether or not there is evidence tending to negative a charge and proof of negligence is a pure question of fact for a jury) it was not error to refuse to give the requested instruction.

In combating the claim that the opinion on the former writ of error is conclusive of this writ of error, we will show how the issues in the two cases were vitally different from each other, and where and in what respect the evidence now presented is stronger than the evidence then presented.

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(1)

**THIS WRIT OF ERROR AS "OF FIRST IMPRESSION".**

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**THE PLEADINGS.**

**Amended Complaint.**

The amended complaint alleges that defendant deflected the stream and made a new channel of less capacity than that of the former channel; that the new channel was too narrow and wholly insufficient to carry the waters at times of floods such as ordinarily occur therein at times of heavy rains; that defendants were grossly negligent in the planning and construction of the flume in that same was of too small capacity, and *in that said flume*

*"was too flimsy, weak and insufficient to hold together during flood waters in said creek; that on September 26, 1918, there occurred, one of the usual periodical heavy rains to which the vicinity is subject, which caused the water of Gold Creek to rise \* \* \* and to be forced through and down said flume or artificial chan-*

nel and said waters were deflected upon, undermined and washed away plaintiffs' land,—and that said deflecting, undermining and washing away happened because the artificial channel was too small, and *because the said artificial channel (cribbing) was so insufficient, flimsy and weak that some of it gave away and lodged in the said artificial channel*” (Par. IV, Amended Complaint, Tr. p. 3).

Thus it will be seen that the amended complaint charges two distinct alleged delicts, to-wit: First, that defendants changed the flow of the water, deflecting it into a cribbed channel, and that the alleged artificial channel was narrower, etc.; Second, that the cribbing was weak, flimsy, negligently constructed and insufficient to withstand an ordinary flood—(that is, so weak and flimsy, and so negligently and insufficiently constructed as to be unable to withstand the strain which could reasonably be expected would probably be put upon it).

Plaintiffs' idea in thus framing the complaint is very evident. Apparently they believed that “one who for his own purpose diverts the waters of a stream from the natural channel or confines them in artificial banks, so as to thereby damage the property of another, is liable for such damages, irrespective of the existence of negligence in his so doing” (Plaintiffs' Brief, p. 21). But obviously they thought that they had better “cast an anchor to windward”, and they expressly add an allegation of specific negligence in the physical

construction of the cribbing, with the view that if it should be held that the law is not as they maintain, or if the proof should show that the defendants did *not* change the flow or narrow the channel, they (plaintiffs) might still have a case by proving "express" negligence in the physical construction of the flume or cribbing. No such doubts assailed plaintiffs at the former trial, for that trial was on a complaint which was framed on the first theory alone; that is to say, there was no allegation then that the cribbing was flimsy, weak or insufficient, or that any "logs or material were washed out of the sides of the cribbing, and became lodged in the flume" (cribbed channel). The *complaint* was founded solely upon the theory that defendants were liable, negligence or no negligence, but by the *amended complaint*, adding the second "delict" above mentioned, plaintiffs have injected into the case a new issue, one which was not involved on the former trial, to-wit: Was the cribbing negligently constructed?

#### **The Answer.**

Denies all the essential allegations of the complaint (Pars. IV and V of answer, Tr. pp. 9, 10), and that is all it does. No affirmative defense is pleaded.

The answer alleges that said flood and heavy rains were unusual, unprecedented, extraordinary, but this is nothing more than a denial of the allega-



tion of the complaint that the flood was “usual and ordinary and periodical”.

The answer alleges that it was such a flood as could not have been foreseen by defendants or anyone else, but this is nothing more than a denial of negligence.

The answer denies that the damage to plaintiffs’ property was caused by any act of defendants and (alleges that it) was due to an Act of God, but if the damage was not caused by an act of defendants, it was unnecessary to allege or prove by whose act it was caused, for if the defendant is guilty of want of care, causing the injury, it is *no defense at all* that the Act of God contributed; and if defendant is not guilty, all he is called upon to do is to deny negligence, thus putting plaintiffs to prove the absence of that care required under the circumstances.

Under the code that only is an affirmative defense which confesses and avoids, but here nothing is confessed, nothing is sought to be avoided.

The defense here pleaded is not at all analogous to a defense which, while admitting shortcomings on the part of defendants, pleads that, notwithstanding those shortcomings, an unexpected convulsion of nature occurred, so overwhelming in its effect upon the works of man that it caused and would have caused the disaster even if those works of man had been constructed with the utmost care—

as, for instance, the happening of an earthquake, or a tidal wave. In such a case, the plea of "act of God" would be an affirmative defense, for it would be to confess a want of care which would hold defendants to liability *unless* the said convulsion were proven.

Nor is the defense at all analogous to the carriers' plea of "act of God" as a defense in an action sounding on contract "to safely carry except as prevented by the public enemy or the 'act of God' ". In such case the defense of "act of God" is an affirmative defense, because the carrier admits the contract and its breach, but seeks to bring himself within the exception. But here the defense is simply a denial of negligence, and nothing is alleged that could not be proven under the general denial.

The answer is argumentative, it is true, and unnecessarily disclosed defendants' case to the adversary, "yet the defense altogether is a denial" "*Pomeroy's Remedies and Remedial Rights*, 2d Ed., Sec. 625, p. 680; *Elliott v. St. Louis R. Co.*, 78 Mo. 518; *Gault v. Humes*, 20 Md. 297; 2 *Bates Pldg. & Pr.*, p. 2884, sub. sec. 1, p. 2885, sub. sec. 1).

### **The Evidence.**

At this trial plaintiffs in their case in chief introduced evidence tending to sustain all the allegations of the amended complaint as to each delict charged therein, and defendants introduced evidence tend-

ing to negative each and every essential allegation as to *each and all* of the delicts so charged.

*The evidence as to the changing of the channel.*—*Shattuck* testified that the channel was not changed; he says that before the cribbing was installed the “original channel” had been filled up by the high water of 1913, and that at the time the cribbing was put in the creek was flowing in the channel which they then “cribbed” (Tr. p. 121). *Casey* also so testified (Tr. p. 212), and *Stewart*, witness for plaintiffs, while stating that the channel marked on his map “Original Channel” was *at one time* the original channel, does not state “*when*” it was the original channel, and says:

“I will state however that channel does not show any recent signs of being cut out. \* \* \* There are still alders and bushes in there” (Tr. p. 25).

*Evidence as to lessening the capacity of channel.*—*Stewart* says that he measured the cribbed channel and that the area of a cross-section thereof was 150 feet, and then he says that he took a cross-section of the “Original Channel” above where it branches and that its area was 230 sq. ft. (Tr. p. 19); but a glance at the map produced shows where he measured, to-wit, the line AB in Block 213. That line measures the width of “Original Channel” and of “Old Channel” combined, and no witness has testified that the water flowed in “Original Channel” and “Old Channel” at the same time. Certainly no witness testified that the water ever *filled*

both those channels at the same time. He also took a measurement of the width of "Original Channel" where said channel crosses 9th Street between blocks 218 and 219 (Tr. p. 20), and gives the width as 62 feet, but he does not say what the depth was nor what was the area of a cross section. Only a "weak, lame and impotent conclusion", then, can be drawn by a comparison of the area of the two cross-sections, i. e., 150 sq. feet and 230 sq. feet.

*Casey* testified that the capacity of the cribbed channel was 40% to 50% greater than the capacity of the flume of the water company which had carried the creek for several years (Tr. p. 211).

The evidence showed that the cribbed channel was narrowed at the lower end, but it was also deepened there (Tr. p. 210), and there is no evidence that its capacity was diminished. The evidence showed that it was good construction to deepen and narrow at lower end (Tr. p. 210; also Tripp, Tr. pp. 274, 275).

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Considering this case as resting alone upon the question as to whether or not the flow was changed or the channel capacity lessened, and admitting *for the sake of argument only* that the law is as plaintiffs contend (to-wit: "If the owner of land through which a stream flows deflects the flow or narrows the channel, he is liable for resulting dam-

age whether the work of so deflecting or narrowing is or is not negligently done”), still it would not have been error to refuse the requested instruction; for in that view of the case it would have been absolutely immaterial whether or not the court told the jury anything at all about what was sufficient to constitute an “act of God”. In that view of the case plaintiffs would have been entitled to an instruction:

“*If you believe from the evidence that defendants deflected the stream or lessened the channel capacity, they are liable for resulting damages—act of God or no act of God—negligence or no negligence.*”

Defendants maintain that the law is not as above stated, and that this court has never held the law to be as so stated. *But pretermittting those questions “for the nonce”, and admitting for the sake of the argument only* that under that aspect of the case it was error to refuse the requested instruction, yet it is to be noted that the amended complaint and the evidence present the case in *another* aspect also, to-wit: they call for a determination of the question as to whether or not defendants were guilty of the specific negligence in the construction of the cribbing, and unless it was error to refuse the requested instruction when the case is considered in *either and both* of said aspects, the assignment of error cannot be sustained.



Considering the case, then, in the last mentioned aspect, it is apparent that the question as to whether or not the cribbing was constructed sufficiently strong to stand the strain which might be reasonably expected would be put upon it is the crucial point.

*Evidence as to nature of the flood.*—Briefly stated, that evidence was as follows:

(1) *Susie Michaelson* (Tr. p. 189), an Indian woman, fifty years of age, born in Juneau, raised on the banks of the creek and observed it all the time she lived there (Tr. p. 195); never saw as much water in Gold Creek (Tr. p. 195), nor as much rain as there was that day (Tr. p. 192).

On page 14 of their brief plaintiffs seek to belittle this woman's testimony by stating that she testified that "she had never before seen Gold Creek except when the water was running in the main channel", and they say, "If this was true the high water of September 26th was the only one she ever saw"; but this cannot be "by no assay of reason", for the witness immediately says:

"Yes, I have seen it go over the banks of the creek, *but I never seen it flow as it did that time you are talking about 1918*" (italics ours).

It is also stated by plaintiffs (on same page): "She also said she couldn't remember how many times she had seen high water. It never entered my mind". What the witness said was, "I couldn't —*I never kept track of how many times.* It never

entered my mind" (*italics ours*; Tr. p. 195, bottom), obviously meaning that to keep track of the *number* of times never entered her mind.

(2) *B. M. Behrends* (Tr. p. 314), a banker; has lived in Juneau ever since 1887; has never seen as high water in Gold Creek (Tr. p. 315), nor as much destruction and damage (Tr. p. 315), nor as great a rainfall:

"It was extraordinary; that is why we went out there" (Tr. p. 318).

(3) *George Dull* (Tr. p. 398); manager of Water Works; has lived in Juneau for over 25 years; never saw as high water in Gold Creek; doesn't believe he *ever* saw as great a rainfall as there was here that day *at any time* within his memory.

Attention is called to the whole of this witness' testimony, as showing the abortiveness of plaintiffs' attempt (on page 15 of their brief) to disparage it.

(4) *John Reck* (Tr. p. 305), president of 1st National Bank, also superintendent of water works; has lived in Juneau for 24 years; never saw the creek as high, nor the rainfall so great (Tr. p. 307). The water company's flume which carried the creek over the water company's springs was overflowing and the timber began to gather at the upper end; later the road and flume went out; water main was gone too, washed out by the flood (Tr. p. 309);

such a thing never happened before (Tr. p. 311); is positive (Tr. p. 313).

The attempt to minimize this witness' testimony by calling attention (plaintiffs' brief) to the fact that during his 24 years of residence he has been absent a few times, a week or two at a time, is unavailing.

(5) *Charles Goldstein* (Tr. p. 179); has lived in Juneau for 37 years; never saw Gold Creek as high as that before (Tr. p. 180); is not positive as to amount of rainfall.

(6) *Allen Shattuck* (Tr. p. 118); has lived in Juneau ever since 1897 (24 years); ever since 1903 has lived in plain view of the creek; never saw as great a rainfall or the creek so high (Tr. pp. 151-2).

(7) *J. C. McBride* (Tr. p. 324); U. S. Collector of Customs; has lived in Juneau ever since 1904; this the largest rain and highest flood ever since he came.

(8) *John C. Hayes* (Tr. p. 353); superintendent of Alaska Road Commission; has lived in Juneau for 10 years off and on; never in his experience has he seen as great a rainfall or as high water in Gold Creek or vicinity as there was on that day.

(9) *George Oswell* (Tr. p. 292); mine superintendent; has lived up Gold Creek from Juneau since January, 1914; at 8:30 a. m. the flow of the creek was larger than the flume (of the water company)

could carry and it was spilling over (Tr. p. 293); never saw Gold Creek so high before or since; *never* experienced as great a rainfall (Tr. p. 296).

(10) *George T. Jackson* (Tr. p. 358); superintendent of Perseverance Mine at head of Gold Creek; has lived in and about Juneau for eleven years; no such water in creek and no such rainfall within his experience (Tr. p. 359).

(11) *Weather records.*—(a) *I. J. Sharick* (Tr. p. 346); kept records of the 24-hour rainfalls from 1894 to 1912; produces records; during the period covered by those years, greatest rainfall was September 7, 1902, 4.01 inches, next greatest was on October 17, 1905 3.5 inches; next greatest on August 26, 1905, 2.17 inches (Tr. p. 347).

(b) *Melvin B. Summers* (Tr. p. 319); in charge of Government Weather Bureau at all times since 1916; before he came weather records were kept by governor's office; all records now in his possession (Tr. pp. 320-1). Records show:

*Rainfall on September 26, 1918, 5.54 inches; next greatest in September, 1902, 4 inches; next greatest in October, 1913, 3½ inches.*

The official records from Washington, showing rainfall, 1909-1918, is filed as Exhibit .....

(c) *George H. Canfield* (Tr. p. 354); engineer U. S. Geological Survey, in charge of water gaging stations since 1910; gage not established in Gold Creek until July 20, 1916; on September 26, 1918, gage record 6.81 feet or 2600 cubic feet per second;

highest before that was August 19, 1917, 1000 cubic feet per second (Tr. p. 355); the high water of September 26, 1918, put the gage out of business (Tr. p. 354, bottom).

(d) *Emil Gastonguay* (Tr. p. 284); in charge of Power Division of Alaska Gastineau Mining Co. at Perseverance Mine and various other places in vicinity of Juneau; Perseverance Mine at head of Gold Creek, 4 miles from Juneau (Tr. p. 386); has kept records of precipitation at Perseverance since 1914; records show *greatest precipitation at Perseverance, September 26, 1918; 7.4 inches; next greatest May 28, 1918, 3.4 inches; next, 2.71 inches; next 2.65 inches, next 2.6.*

(12) There was evidence that defendant Casey came to Juneau in 1898; he was familiar with climatic conditions, rainfall and flood conditions, height of water (Tr. p. 214), and took them all into consideration in building the cribbing (Tr. p. 213); consulted with Tripp and other engineers (Tr. p. 213); the cribbed channel was 40 to 50 per cent greater than a flume up the creek that had safely carried the waters (Tr. p. 211). Tripp considered the cribbing good, suitable construction (Tr. pp. 275-4).

(13) It was in evidence that this flood swept away structures of long standing and did damage the like of which never before was inflicted; a bridge over Gold Creek had withstood every flood from before 1898 to 1914, when it was torn down



(Tr. p. 222), and a new one built 4 or 5 feet higher; this latter bridge went out (Tr. pp. 223, 148). The Ebner flume and two bridges went out (Tr. p. 295). One hundred fifty feet of approach to another bridge that had stood for 15 years or more was "washed clear away and the bridge left high and dry" (Tr. p. 360). The road was washed out entirely, the map of the whole creek was changed (Tr. p. 295). Juneau was in darkness; no lights that night (Tr. p. 206). Oswell came to town for safety (Tr. p. 298).

(14) The flood completely washed away in a few hours upland lying many feet above the channel level, which was covered in part with stumps and had never so far as known been so affected by floods before, and this, too, before the flood waters reached the cribbed channel (Tr. pp. 141-2). Trees, stumps, boulders, bridges, flumes, houses were swept away by the angry waters.

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## THE LAW.

### DEFENDANTS NOT INSURERS.

It is the doctrine of the American authorities (almost unanimous) that the owner of land through which a stream flows who changes the flow or narrows the channel or cribs the banks, *and who exercises reasonable care in so doing*, is not liable for damage inflicted.

Cases so holding from nearly every State in the Union are cited in the margin.<sup>1</sup>

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- (1) Farnham on Waters and Water Rights, secs. 477, 990.  
*Alabama*: 145 Ala. 639, 39 So. 603, 117 Am. St. Rep. 61; 176 Ala. 174, 57 So. 833; 183 Ala. 411, 62 So. 802;  
*Arkansas*: 57 Ark. 387, 21 S. W. 1066;  
*California*: 10 Cal. 413; 10 Cal. 541; 17 Cal. 98; 23 Cal. 255; 35 Cal. 683;  
*Colorado*: 14 Col. App. 123, 59 Pac. 422;  
*Connecticut*: 55 Conn. 510, 13 Atl. 409; 81 Conn. 87, 70 Atl. 650;  
*Georgia*: 98 Ga. 184, 26 S. E. 738; 134 Ga. 107, 67 S. E. 652;  
*Idaho*: 9 Idaho 392, 74 Pac. 1075.  
*Illinois*: 143 Ill. 127, 32 N. E. 529; 43 Ill. App. 78; 11 Ill. App. 17;  
*Indiana*: 3 Ind. 236, 54 Am. Dec. 481; 60 Ind. App. 118, 110 N. E. 230;  
*Indian Territory*: 3 Ind. Ter. 352, 58 S. W. 570;  
*Iowa*: 126 Iowa 90, 101 N. W. 736; 148 Ia. 556, 126 N. W. 369; 159 Ia. 666, 141 N. W. 49; 170 Ia. 203, 152 N. W. 779; 115 N. W. 1013; 158 N. W. 676;  
*Kansas*: 26 Kan. 754;  
*Kentucky*: 161 Ky. 793, 171 S. W. 405; 166 Ky. 327, 179 S. W. 195; 167 Ky. 329, 180 S. W. 517; 107 S. W. 781; 32 Ky. L. Rep. 1049; 121 S. W. 972; 147 Ky. 37, 143 S. W. 770;  
*Maine*: 66 Atl. 646, 99 Me. 134, 58 Atl. 674; 56 Me. 443; 12 Me. 238;  
*Maryland*: 75 Md. 458, 24 Atl. 157;  
*Massachusetts*: 2 Allen 358; 13 Gray 193;  
*Michigan*: 45 Mich. 578, 8 N. W. 587, 909;  
*Mississippi*: 72 Miss. 677, 17 So. 78, 48 Am. St. Rep. 579, 27 L. R. A. 762;  
*Missouri*: 187 S. W. 260; 17 Mo. App. 177; 161 Mo. App. 472, 144 S. W. 174; 36 Mo. App. 476; 69 Mo. App. 431;  
*Montana*: 45 Mont. 33, 121 Pac. 886;  
*Nebraska*: 14 Neb. 170, 15 N. W. 321; 76 Neb. 420, 107 N. W. 590, affirmed 81 Neb. 430, 116 N. W. 299; 95 Neb. 506, 145 N. W. 1013; 96 Neb. 714, 148 N. W. 900; 81 Neb. 186, 115 N. W. 755;  
*New York*: 70 Hun. 495, 24 N. Y. S. 381; 75 Hun. 479, 27 N. Y. S. 469; 122 N. Y. S. 1095, judgment affirmed 151 App. Div. 198, 104 N. Y. S. 702;  
*Ohio*: 31 Ohio Cir. Ct. Rep. 349;  
*Oregon*: 47 Ore. 350, 83 Pac. 843;  
*Pennsylvania*: 96 Pa. 65, 42 Am. Rep. 529; 218 Pa. St. 309, 67 Atl. 644; 30 Pa. Super. Ct. 305; 203 Pa. St. 516, 53 Atl. 361; 9 Watts 119, 34 Am. Dec. 507; 23 Pa. St. 445; 64 Pa. St. 106, 3 Am. Rep. 578; 66 Pa. St. 91; 157 Pa. St. 622, 27 Atl. 793; 6 Pa. St. 379, 47 Am. Dec. 474;  
*Texas*: 50 Tex. 330; 69 Tex. 617, 7 S. W. 374; 98 Tex. 590, 86 S. W. 744;  
*Vermont*: 81 Vt. 141, 69 Atl. 732, 130 Am. St. Rep. 1031, 16 L. R. A. N. S. 928;  
*Washington*: 85 Wash. 397, 148 Pac. 567;  
*Wisconsin*: 38 Wis. 21; 143 Wis. 169, 126 N. W. 666;  
*Virginia*: 105 Va. 343, 54 S. E. 25, 6 L. R. A. N. S. 252.  
*Federal Courts*: 57 Fed. 441.

This court has not held to the contrary—either on the former writ of error or in any other case. In its decision on the former writ of error this court said:

“Such an instruction *would have been justified* under the doctrine of the leading case of *Ryland v. Fletcher*, L. R. 3 H. L. 330, and other English cases cited by the plaintiffs. \* \* \* This inherently just and equitable doctrine of the English Courts has been accepted in *a few* of the courts of the United States; \* \* \* and no reason is suggested why it should not be applied to the present case, except the reason—if it be a reason—that *it is opposed to the decided weight of American authority.* \* \* \* But if that reason is controlling and we are required to *follow the rule generally accepted in the United States that one who in changing the natural channel of a stream exercises reasonable precaution against floods which may be expected is not responsible for damage occasioned thereby, there still remains* \* \* \*” etc. (Italics ours.)

Thus it will be seen that while the learned Justices who concurred in the decision seemed to “look askance” at the “doctrine of the decided weight of American authority”, they do not refuse to adopt that doctrine.

That this court means to follow that doctrine affirmatively, appears by a later pronouncement of this court in the case of *Nelson v. Casey* (279 Fed. 100, 102)—a case arising out of the flood in question here, where the opinion was concurred in by the

same Justices who rendered the opinion in *Eikland v. Casey* (supra). There this court says:

“The duty which devolved upon the defendants was not that of insurer, but was to use reasonable care to construct the bulkheads of sufficient strength to resist waters which ought reasonably to be anticipated as likely to come down the creek, and to use reasonable care to maintain the bulkheads of sufficient strength to resist such waters.” (Citing cases.)

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#### ACT OF GOD—EXTRAORDINARY FLOOD—BURDEN OF PROOF.

The essential question in this case, under the last mentioned aspect (i. e., the charge of negligence in construction of the cribbing), is not, strictly speaking, whether the cribbing broke under a strain put by an “act of God”; but rather it is this: Were defendants negligent? Was the strain which was put upon the cribbing such as defendants ought reasonably to have expected would be probably put upon it by someone, be that some one *God* or *man*? And did such strain break the cribbing? And ought defendants to have reasonably expected that such strain would break the cribbing?

As an eminent author expresses it, “The test in every such case being whether the defendant ought reasonably to have anticipated that evil consequences would flow from his act” (1 *Thompson on Negligence*, Sec. 74); and

“Thus a railroad company constructs a culvert of sufficient dimensions to carry off all water that accumulates in times of ordinary



freshets but which proves insufficient in a time of flood *so great as to be ascribed* to the act of God—a flood so great that the company could not be expected to foresee and provide against it. Here the company ought not to be liable to pay damages; and one may take his choice between these two reasons: (1) The catastrophe is to be ascribed to the ‘act of God’ \* \* \* (2) *The railroad company has not been negligent*” (italics ours).

Whether the cribbing gave way under a strain reasonably to be expected would be put upon it was a pure question of fact for the jury. The court could no more properly tell the jury that they *must* consider the strain an ordinary one, than it could properly tell them that they *must* consider the strain an extraordinary one. The author last above quoted says:

“Consequently it does not follow—especially where the independence of juries is vigorously upheld—that the judge can properly order a nonsuit in an action for an injury founded upon the overflow of sewers, or the failure of a culvert to carry off water during a severe fall of rain, because he may take the view that the storm was, under the evidence, ‘extraordinary’” (Thompson on Negligence, sec. 4877, citing Capital Ptg. Co. v. Raleigh, 126 N. C. 516, 36 S. E. 33; McClure v. Red Wing, 28 Minn. 186; 9 N. W. 767).

All the court *could* do in this regard, was to tell the jury what is meant by anticipatable strain and what is meant by unanticipatable strain, leaving it to them to find whether, under the evidence, the



strain was the one or the other. This is all the court did, and there is no complaint that in so doing the court misstated the law on that point. The complaint is only that the court refused to instruct that there was *no evidence* of *act of God*. In using the expression “act of God”, it is to be noted that as applied to this case, the terms “act of God” and “extraordinary flood” are interchangeable, and neither of them means anything more than “unanticipatable” event. If the flood was unanticipatable, it was “extraordinary”, and if it was extraordinary, it was an “act of God”; and it was not an act of God if it was anticipatable, and if it was an anticipatable flood, it was an ordinary flood.

It is evident from the instructions taken as a whole that the *court* used the terms “act of God” and “Extraordinary flood” as meaning one and the same thing. When, then, plaintiffs contend that the court should have instructed the jury that “There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs’ property was caused by an ‘act of God’, as that term is used in the law”, they in effect ask the court to instruct the jury that there is no evidence that the strain put upon the cribbing was greater than that which it could be reasonably expected to bear—a pure question of fact which the jury might have found against the plaintiffs even if defendants had introduced no evidence at all on the subject;—they in effect maintain that all the evidence

for defendants herein does not even tend to negative the charge and evidence of negligence.

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**NEGLIGENCE TO BE PROVEN.—RES IPSA LOQUITUR.**

If there is any exception to the rule that he who alleges negligence must prove it, we have never read of it. Certain it is that the rule is not changed by *res ipsa loquitur*.

“In all actions for damages for the injury of property from breakage and overflow (except in reservoir and dam cases in jurisdictions where by statute, or by court decisions the owner is made the insurer against all damages), the gist of such actions is negligence; and therefore until such negligence is shown by the evidence, there can be no liability upon the part of the defendant causing the injuries: \* \* \* and therefore, the burden of proof rests in the first instance upon the plaintiff to prove the negligence in conformity with the allegations in his complaint charging the same. \* \* \* Mr. Farnham states a different rule, as follows: ‘If a break occurs the burden is upon the owner of the ditch to establish his freedom from negligence, and his failure to do this will render him liable.’ That this is not the rule of law in these cases is borne out by the great weight of authority. As was held in an early California case the rule of *res ipsa loquitur* does not apply in such cases (citing *Tenney v. Miner*, 7 Cal. 335). In a late Washington case, however, the exact contrary rule was adopted and the court said, ‘We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character’; *Dalton v. Selah*, 122 Pac. 4. \* \* \*

The rule as stated by Mr. Farnham is not the correct one as laid down by the authorities, neither is it the logical one." 3 Kinney, sec. 1693, pp. 3124, 3125 (italics ours), citing cases.

We think there is no conflict between the rule as announced by Mr. Kinney, and those cases which hold that the doctrine of *res ipsa loquitur* applies; for *res ipsa loquitur* is itself a mere rule of evidence, and does not at all shift the burden of proof.

*Kahn v. Triest Rosenberg Co.*, 139 Cal. 341, 346;

*Cody v. Market St. Ry. Co.*, 148 Cal. 90;

*Rourgournon v. P. R. R. Co.*, 57 Cal. Dec. 602.

Or, as the Supreme Court of the United States expresses it:

"In our opinion *res ipsa loquitur* means that the facts of the happening \* \* \* make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur* where it applies does not convert the defendants' general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff." *Sweeney v. Erving*, 228 U. S. 232; 50 L. Ed. 240.

Plaintiffs' evidence tended to show that defendants changed the flow of the water and narrowed the channel, and that damage resulted therefrom. This, if believed by the jury, would (under the cases holding that *res ipsa loquitur* applies), give rise to a prima facie presumption of negligence

which is of itself evidence of negligence. If, then, plaintiffs had produced no further evidence, they would have made (under such cases) a *prima facie case*, but it would have been a *prima facie case with respect only to the delict first charged in the amended complaint*—and even as to that delict it would have been a *prima facie case on account only of the presumption* which came to plaintiffs' aid as evidence; and, as *defendants' evidence* tended to show that defendants *did not* change the flow of the stream or lessen the capacity of the channel, the question in this regard for the jury to determine was whether or not *any facts were established* which would give rise to the said presumption. If the jury should decide that defendants *did not* change the flow of the stream or lessen the channel's capacity, the presumption would vanish and plaintiffs would certainly lose the case, *unless they had proven that defendants were otherwise guilty of want of ordinary care*. But if plaintiffs produced evidence as to the first delicts charged and produced *no* evidence of any additional negligence on the part of defendants, the utmost plaintiffs could have asked the court to instruct would have been in substance this:

“*If you believe that defendants deflected the flow or lessened the channel's capacity, they are liable whether the flood was or was not an act of God.*”



But plaintiffs did not request an instruction as above indicated, and they *did* produce evidence tending to show other and additional negligence.

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In the effort to prove that defendants were otherwise guilty of negligence, plaintiffs have no presumption to aid them. In this regard it will not be sufficient to prove simply what defendants did. Plaintiffs must go a step further and prove that what the defendants did was not sufficient to meet the dangers which the latter had reason to expect would arise. Plaintiffs seem to "sense" this at the trial, for they produce in their case in chief two witnesses who gave evidence tending to show that the flood in question was "ordinary" (Wagner, Tr. p. 105, and Coggins, Tr. pp. 96-7); that is, that it was a flood reasonably to be expected; that it was not an unanticipatable flood;—this, of course, in the effort to establish that defendants *did not exercise ordinary care* when they built the cribbing so "weak, flimsy and insufficient", for plaintiffs could not be said to have introduced evidence tending to show negligence in this regard unless they had introduced evidence tending to show that the danger was one which was likely to arise—one which defendants knew or ought to have known was likely to arise—one which an ordinarily prudent person would have guarded against. There being no affirmative defense pleaded, defendants'



evidence *in this regard* went no further, and did not need to go any further, than simply to *tend* to meet the case of negligence made by plaintiffs—than simply to *tend* to show that the flood was not one which the ordinarily prudent person would guard against, i. e., could reasonably expect would likely occur.

The issue and evidence as to the character of the flood is here—plaintiffs maintaining that it was such a flood as should have been guarded against, defendants maintaining that it was not such a flood as was required to be guarded against. There is no presumption that it was the one or the other, but defendants start out with the presumption that they were not negligent and the burden is on plaintiffs to prove negligence.

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As there was evidence that the flow was not deflected, or the capacity of the channel lessened, a jury might well find in the negative on those points, and yet they would have to find for plaintiffs if they believe from the evidence that the cribbing was negligently constructed, and that such negligence caused the disaster. In determining that question of negligence, they would necessarily have to consider not only the manner of the construction of the cribbing, but also the nature and force of the strain which it would be reasonable to expect might be put upon it; and the further question, of course,

whether or not the cribbing gave way under a “reasonably to be expected” strain. The jury could not find negligence unless plaintiff proved negligence; the plaintiffs could not prove negligence in this regard without proving that the strain was one reasonably to be expected; and plaintiffs could not prove that the flood was one reasonably to be expected without proving that the flood was ordinary.

The burden then was on plaintiffs to prove that it was an *ordinary* flood; not on defendants to prove that it was an “extraordinary” flood, for an ordinary flood is one reasonably to be expected, i. e., anticipatable; and an extraordinary flood is one not reasonably to be expected, i. e., unanticipatable. If, then, plaintiffs proved that it was an ordinary flood they necessarily proved that it was *not* an extraordinary flood; but if they did not prove that it was an ordinary flood they have not proved that the cribbing broke under a strain “reasonably to be expected”, and consequently have not made out a case of negligence.

*Moreover*, granting for the sake of argument *only* that there was a burden on the defendants, it was not the *burden of proof*, strictly speaking; it was simply the burden of going forward with evidence. Mr. Wigmore calls attention to the fact that those two expressions are not to be confused (*Wigmore on Evidence*, p. ....; see also 22 *C. J.*, p. 67).

Evidence tending to show that the flood was an ordinary one having been produced by the plaintiffs, surely (under a general denial of negligence) defendants need produce evidence *only tending* to meet the case made by plaintiffs, and then it is for the jury to say whether defendants' evidence is strong enough to *balance* plaintiffs' evidence.

**In conclusion on this branch of the case:**

If all the evidence produced by defendants does not even tend to show an extraordinary flood, what requisite is lacking?

It is said that the *locus in quo* was a rainy country, and that defendants should have expected floods. So it is, and so they should, but all things are relative, and a flood even in a rainy country may come at an unexpected time and with unexpected violence.

Were defendants required to produce evidence of a cloudburst or a tidal wave or earthquake, or of some similar overwhelming *vis major*? Certainly *such vis major* is not the *only* thing the prudent man is not required to guard against; else is Mr. Weil wrong when he says,

“It is thus not true to say that only ‘Acts of God’ absolve from liability for flood, since reasonable care cannot guard against some floods which still fall short of technical *vis major*” (1 Weil on Water Rights, sec. 462, p. 493, bottom, 3d Ed.).

Were defendants required to prove that the flood was *unexplainable*? All floods are *unexplainable*, even a moderate flood. Indeed, although man *essays* to explain most of the phenomena of nature, yet in his explaining he can only go a step or two, whether the object to be explained is the earthquake or the summer shower. But still the earthquake may be and generally is unexpected and unexpectedable, while the summer shower may be and generally is expected and expectable.—And the question of negligence or no negligence depends not on whether a thing can or cannot be explained after it has happened, but rather on whether it was or was not reasonably to be expected. In defining extraordinary flood the author of the Am. & Eng. Encyc. does not use the word “unexplainable”. He says: “An extraordinary flood is one of those *unexpected* visitations” etc. (13 Am. & Eng. Encyc. Law, 2nd Ed., p. 687).

Has the evidence gone back *not far enough* in point of time? It has gone back to a period before the coming of the white man in 1881. Defendants say they were familiar with climatic conditions so far as they could be learned, and built the cribbed channel much larger than other flumes carrying the creek. There is no specified number of years which the prudent man, everywhere and under all conditions, must embrace in his investigations, in order not to be classed as imprudent. It all depends on “reasonableness” and “reasonableness” depends on circumstances, and the jury is

the judge of "reasonableness under the circumstances".

The character of the storm as being ordinary or extraordinary is for the jury.<sup>2</sup>

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## II.

**LAW OF THE CASE—EIKLAND v. CASEY, 266 Fed. 821.**

Plaintiffs maintain that the decision of this court on the former writ of error in the case is the "law of the case", and is conclusive to the effect that the court should have given the requested instruction as above set out; but certainly the decision of this court on the former writ of error is not the "law of the case", except in so far as the point then before the court and actually decided by it is presented on this writ of error; and, too, said decision is not the "law of the case", except in so far as the issues, evidence and instructions here presented are substantially the same as the issues, evidence and instructions there presented.

It is pertinent, then, to inquire: (A) What was the point presented and what was actually decided at the hearing on the former writ of error? (B)

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(2) *Garrett v. Beers*, 97 Kans. 255;  
*Gult R. Co. v. Calhoun*, 24 S. W. 362;  
*Ohio v. Thillman*, 143 Ill. 127;  
*Topsham v. Lisbon*, 65 Me. 449;  
*Mandy v. N. Y. R. Co.*, 75 Hem. 479;  
*McClure v. Red Wing*, 28 Minn. 195;  
*Borchardt v. Wassau*, 54 Wis. 107;  
*H. G. N. R. v. Parker*, 50 Tex. 330;  
*Gray v. Harris*, 107 Mass. 492.



How, if at all, do the issues, evidence and instructions presented on this writ of error differ from those which obtained on the former writ of error?

### A.

#### WHAT WAS DECIDED ON THE FORMER WRIT OF ERROR?

This question was there presented, to-wit: Were the instructions of the court upon the question of an ordinary flood sufficient? This court said: "We think the exception was well taken", and it sent the case back for a new trial (266 Fed. 823).

The question as to whether or not the evidence there was sufficient to show extraordinary flood was not before the court. Indeed plaintiffs themselves considered that the evidence on the point was sufficient, for they made no motion for the court to instruct that said evidence was insufficient, and they themselves requested instructions on the subject of "act of God" (see Requested Instructions, bottom of page 245, Tr. in No. 3365, Eikland v. Casey, 266 Fed. 821). They complained not that the evidence was insufficient, but that the instructions given were not sufficient.

We maintain that nothing is the "law of the case" except that the instructions given on the former trial were insufficient, and we further maintain that the issues *now* are substantially different and the evidence substantially stronger and the instructions substantially different.

## B.

**ISSUES DIFFERENT; EVIDENCE STRONGER; INSTRUCTIONS DIFFERENT.**

*Issues Different.* The only delict charged in the complaint, as it was on the former trial, was "That the new channel thus constructed" etc. (P. 3 old record.)

As beforesaid, the action was not then founded on negligence at all, but solely on the claim that the law is that one who deflects the flow or lessens the capacity of the channel is liable whether he was or was not guilty of negligence in the construction.

The opinion on the former occasion is based upon the assumption that the things so charged were *established as facts*, for in the statement immediately preceding the opinion proper it is said:

"The evidence *showed that the defendants constructed* bulkheads across Gold Creek and thus dammed the same and diverted it from its natural bed";

and in the opinion proper it is said,

"The defendants, for their own benefit, closed the channel and made a new one, against the plaintiffs' protest that the change would endanger their property."

It would not be pertinent to inquire here whether the things so stated as facts were or were not disputed at the former trial. It is sufficient that this court stated them to be facts, and based its opinion on said statement of facts. But, however that may

be, that which the court stated as being *facts then* before it is not before it *now* as “facts”, for each and all of the material allegations of the Amended Complaint are put in issue by the Answer, and the evidence disputes them all.

And by injecting into the case a pure question of negligence in the construction of the cribbing, and by introducing evidence of the alleged faulty construction, and of the character of the flood which strained and broke the cribbing, the plaintiffs have made a case which defendants surely may meet (under the general denial) by introducing evidence tending to show that the strain which smashed the cribbing was one which an ordinarily prudent man is not required to guard against, and so there would be presented a question for the jury and not for the court.

The statement of this court on the former Writ of Error to the effect that the evidence there produced was insufficient to show “act of God” goes this far, then, and no further, to-wit: “When no charge is made of faulty construction of the cribbing, and *when it is a fact* that defendants changed the flow and lessened the capacity of the channel, the burden is on defendants to show ‘act of God’ by ‘clear and convincing’ evidence”.

But the evidence as to the character of the flood is *now* much stronger than it was at the other trial, viz:

**Evidence stronger.**

The opinion of this court on the former trial intimates that the evidence there produced was not sufficient to show act of God, and it goes on to particularize as follows (Tr. p. 266, fol. 823):

“Defendant Casey admitted that before the cribbing was put in he knew that at times of very high water the water would flow over the banks at any place.”

There is no such admission in the evidence *here*.

“The defendants called three witnesses who testified as to their observation of floods in the stream during the last 10, 11 and 15 years, and their testimony covering as it does so short a period of time, may be held negligible.”

The testimony *here* presented goes back for 23, 25, 27 and even 50 years or thereabouts.

“The defendants also called witnesses who had observed the stream for longer periods. Coggins who had lived in Juneau 23 years when asked whether he had ever seen freshets as high as that of 1918, answered, ‘They might have been higher for all I know’ ”.

Coggins was *called by plaintiffs, not by defendants*.

“Layton was asked whether within his memory of 30 years he had seen as great a rainfall or as high water as on September 26, 1918—he answered, ‘No, I don’t think so’ ”.

Layton’s testimony *on this trial* is clear and positive.

“Behrend who had been thirty-two years at Juneau said that he thought the flood was the



greatest he had ever seen, but he would not undertake to say positively that it was."

Behrend's testimony *on this trial* is much stronger.

On this trial defendants produced not only every witness heretofore produced, but also Susie Michaelson, John Reck, George Dull, Charles Goldstein—all of them old residents of Juneau, whose acquaintance with the creek and climatic conditions goes back for many years; and while one or two of them (Goldstein) is not certain as to "rainfall", all of them are positive as to the extraordinary height of the water in Gold Creek and its destructiveness. The testimony of the Indian woman, Susie Michaelson, alone vastly strengthens the case. The "untutored savage" makes close observation of the manifestations of nature, noting minute details of wind and tide and flood and snow; and, too, his memory revivifies the experiences of his own life, and preserves the traditions handed down from father to son of all the remarkable happenings which have affected his habitat or his race. This woman, 50 years of age, was born where Juneau now is, and was ten years old when the white man came to Juneau in 1881 (Tr. p. 362). For years she lived on the banks of the creek, and practically all her life has been spent in the vicinity. There is no evidence even of a tradition of a flood so great. No Indian is produced who ever saw or heard of such a flood or such a rainfall. Plaintiffs produced no one who swears he ever saw so great a rainfall, and they could produce only one man who was willing to swear that there was ever so much water in the creek. He,



Wagner by name, swears that once (time not stated) the creek was a foot and a half higher than it was in 1918. This is remarkable testimony, for the flood of 1918 took out a bridge which was 4 or 5 feet higher than a certain other bridge which had been spanning Gold Creek Canyon since before Wagner came to the country. He says that the flood he speaks of was  $1\frac{1}{2}$  feet higher than that of 1918, and yet it did not take out a bridge which was 4 or 5 feet lower than the bridge which went out in 1918. The keen "scent for testimony" which discovered Wagner "went cold on the trial", for not another Wagner was produced. It is fair to assume that "his like was not to be found on land or sea".

#### **Instructions different.**

The instruction given at this trial as to what is an extraordinary flood is not the same as the former instruction on that subject (Instruction in this case, Tr. p. 388, top par.; Instruction in that case, Tr. in No. 3365, p. 353 bottom).

In its opinion this court inadvertently misquoted the Am. & Eng. Encyc. Law, using the words "*unexplainable* visitation" (266 Fed. 823), while the text used the words "*unexpected* visitation". But the instruction given at this trial went even further than "*unexplainable* visitation"—the instruction says "*unexplained* visitation" (Tr. p. 388).

No claim is made now that "the instructions on the subject of 'extraordinary flood' are not sufficient under the evidence".

We submit, then, that the decision on the former Writ of Error having been rendered when the issues were different, and the evidence was less and the instruction was different, is not the "law of the case" to the extent of sustaining this Assignment. And we further submit that there is absolutely no foundation for saying (as plaintiffs do say) that the lower flouted the decision of this court.

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**ASSIGNMENT No. I. (Tr. p. 395.)**

"That the court erred in refusing to direct a verdict for plaintiffs".

The requested instruction could be justified only if three conditions obtain, viz: (1) If the law is that "If defendants interfered with the flow, or lessened the capacity of the channel, they are liable, whether there was or was not negligence"; (2) If the *undisputed* evidence is that defendants did interfere with the flow, or lessen the capacity of the channel, and (3) If the evidence as to the faulty construction of the cribbing and of the character of the flood was such that the court would have been justified in instructing the jury that *as a matter of law* defendants were negligent in that regard.

Not one of these conditions obtains here. The *non-existence of condition No. 1* is established by the overwhelming weight of American decisions,

including the decisions of this court—said authorities holding that defendants would not be liable unless they were guilty of negligence; and the *non-existence of condition No. 2* is established by the fact that the charges of interfering with the flow, and of lessening the channel's capacity are, each and both, *denied in the Answer and disputed* in the evidence for defendant; and the *non-existence of condition No. 3* conclusively appeared, we think, in the foregoing discussion of Assignment of Error No. 2.

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### IN CONCLUSION.

The gist of the action is negligence. The evidence tending to show that the defendants were not negligent is abundant; the jury, "native here and to the manor born", has decided that the defendants were not negligent; no error in instructions has been established; none other is claimed by plaintiffs in error.

The judgment should be affirmed.

Dated, San Francisco,

May 19, 1923.

Respectfully submitted,

H. L. FAULKNER,

*Attorney for Defendants in Error.*

ROBERT W. JENNINGS,

*Of Counsel.*



No. 3974

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IN THE

**United States**  
**Circuit Court of Appeals**  
For the Ninth Circuit

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A. EIKLAND AND O. EIKLAND,

Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK  
and ALLEN SHATTUCK,

Defendants in Error.

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Petition for Rehearing

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FILED

AUG 8 - 1923

RECORDED

J. H. COBB,

Attorney for the Plaintiffs in Error,  
and Petitioners.





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**PETITION FOR REHEARING**

**To the Honorable, the Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:**

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Plaintiffs in Error, believing that under well established precedents, they are entitled to a reversal of the judgment against them upon the errors of the trial court, found and pointed out in the opinion of this Court, and that such errors were not harmless, most respectfully, but most earnestly petition your Honors for a rehearing.

Your Honors held and decided that the evidence "fell far short of proving that the flooding was so far due to natural causes, directly and exclusively with-

out human intervention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of defendants.

“The court therefore, should have decided as matter of law that the flooding was not due to an Act of God,” etc. But the Court, further along in the opinion says: “but in no way could such error have prejudiced the plaintiffs. Surely plaintiffs cannot complain if the verdict was rendered upon the ground that the damages were caused by inevitable accident or the result of vis major, or the Act of God, against which one cannot reasonably be expected to guard, provided the correct rule applicable was stated, as it was in substance; that if it was found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or foreseen, verdict should be for defendants; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable.”

But the trial court also charged the jury, and this appears to have been overlooked by your Honors, that, “Naturally two questions arise under the issues and admitted facts” etc. (first the question of defendants negligence, and then) “The second question is: *whether the damage complained of was caused solely by an Act of God, and in no way contributed to by the act of the defendants in the construction of the flume.*” (Rec. pp. 381-2 Italics ours).

And again the trial court told the jury: “An extra-

ordinary flood, to constitute which would be an act of God, *relieving a person from all liability*, is one of those unexplained visitations," etc. (Rec. 388, Italics ours).

And again, after instructing the jury, in substance, that if the damage was the combined result of an act of God and negligence of defendants, the defendants were liable, the court modified the rule given by this qualification, "*unless the damage would have happened if he had not been negligent.*" (Rec. 390. Italics ours).

Now there was no evidence that this flood, which raised the water only 6.81 feet was the Act of God; there was no evidence that the flood would have done any damage to plaintiffs' property alone and of itself, that is, that it was an Act of God "*relieving a person from all liability.*" Yet the jury *may have decided*, indeed most probably did decide, that the flood was an Act of God, and therefore defendants were relieved of all liability in any event, or, that being an Act of God, the destruction of plaintiffs' property "would have happened if he (defendants) had not been negligent." Certainly this Court cannot say from the record that such consideration did not influence and control the jury in arriving at the verdict. When that is the case, the law is that the unsuccessful party is entitled to a new trial.

"Where erroneous instructions are given the verdict of the jury should not be permitted to stand, unless it is plain from the record that it must have been what it was in spite of the instructions."

Wiersbick v. Illinois Steel Co. 94 Ill. Ap. 400.

McVey v. St. Clair Co. (W. Va.) 38 S. E. 648.

Can this Court say with any certainty that if the trial court had not erroneously injected the question of the Act of God into the instructions; if the jury had not been told that an Act of God relieved from all liability; if they had not been told in effect, and without evidence to support the instruction, that even though defendants were negligent yet if the flood was the Act of God, and the damage would have happened anyway, they were not liable, the verdict would not have been for the plaintiffs?

“If it be possible that the unsuccessful party was prejudiced by an erroneous instruction, the verdict must be set aside.”

Davenport vs. Prentice. 110 N. Y. S. 1056, 126.

App. Div. 451. Id. 118 N. Y. S. 933. 134 App. Div. 934.

McBride vs. Huckins 81 A. 528 (N. H.).

Can this Court say that the error of the lower court in assuming that there was evidence that the damage was done solely by and Act of God, did not prejudice the plaintiff? May not the jury have been influenced thereby to minimize the evidence of plaintiffs tending to show negligence and referred to and decided the whole case on the theory of the Act of God?

May it not be that this erroneous instruction, given in disregard of the former decision of this court, led the jury to base the verdict upon the theory that although there was negligence in the construction of the flume, such as would have rendered the defendants lia-



ble had the damage resulted from an ordinary flood, yet they were not bound to foresee and provide against an Act of God, and so were not liable? Can this Court say that the verdict was not influenced by some such theory based upon the erroneous instruction complained of?

“Where it is impossible to say upon what theory or upon what part of the Court’s charge a verdict was based, error in any one of the instructions which may influence the jury entitled the unsuccessful party to a new trial.”

Ayer vs. Lord Tie Co. 117 S. W. 1080.

Western Union Tel. Co. vs. McMullin 135 S. W. 909.

Bruce vs. Horn 52 Pac. 1036.

Balderston vs. Cudahy Packing Co. 117 N. W. 986.

Kirk vs. Smith 138 Pac. 1088.

Morrow vs. Southern Ry. Co. 61 S. E. 622, 16 L. R. A. (N. S.) 642.

Auto Gas Engine Works vs. Pepper, 77 A. 443.

“Where it cannot be determined whether the jury followed correct instructions given or conflicting erroneous instructions also given, the verdict must be set aside.”

Heder vs. California Hospital Co. 174 Pac 654.

Now it is impossible to say whether the jury in this case did not reach their verdict upon the theory that the damage was an inevitable accident due to an Act of God, “against which one cannot reasonably be expected to guard,” and disregarded entirely the question of the

negligence of the defendants as being wholly immaterial. The correct rule given by the trial court may not have been followed by the jury at all, because they may have thought that the issue of the Act of God, twice decided by this court to be wholly erroneous, controlled the case. Surely then the plaintiffs can justly, and should successfully, "complain if the verdict was reached upon the ground that the damages were caused by inevitable accident of vis major or Act of God, against which one cannot reasonably be expected to guard," when this court has twice decided there was no evidence tending to sustain any such ground; and this notwithstanding the jury were also told "that if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or foreseen, verdict should be for defendants; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable." For the jury were also told that an "Act of God, *relieving from all liability* (Italics ours) is one of those unexplained visitations" etc., and that if the flood was an Act of God, and defendants were negligent, yet they were not liable if this assumed Act of God would have caused the damage in any event. Suppose the jury, when they retired to consider of the verdict, read the charge of the Court, and when they came to the definition of the Court of an Act of God, "relieving from all liability," simply stopped, and said, "That settles the case. The flood was of course the Act

of God, and as such relieves from all liability. We will find for defendants.” Would not the plaintiffs have a just cause of complaint? Ought not the verdict to be set aside? Can this Court say that the verdict was not reached in some such way? Or suppose the jury found the defendants negligent in every respect charged, but further found that the flood was an Act of God, and being an Act of God, and because it was an Act of God would have destroyed plaintiffs’ property any way, and based their verdict thereon; but would have found otherwise if they had not been permitted to lay the blame on the Almighty, would not the plaintiffs have just cause of complaint? In other words, can this Court say that the erroneous instructions given did not influence the jury in arriving at their verdict, either by deciding upon an issue not raised by the evidence or by giving that issue weight and value in determining the question of defendants negligence? It may well be, that the jury found the defendants negligent in not anticipating and sufficiently providing against the danger from an ordinary flood, such as was to be expected, and not negligent in failing to provide against an Act of God.

The principles above enunciated have been applied by this Court in a recent case.

Richards vs. American Bank of Alaska, 234 Fed. 300.

The action was upon a promissory note against Richards, the plaintiff in Error, and one Williams. Richards gave Williams a sum of money to buy a one-fourth interest in a mine; there was no evidence of a general

partnership between Richards and Williams, to purchase the whole mine, though they were to be jointly interested in the share to be purchased. Williams borrowed money to buy the whole mine, and executed the note sued on, purporting to be the obligation of himself and Richards, and as a partner signed Richard's name. There was some evidence tending to show a ratification by Richards of Williams acts. The lower court submitted two issues to the jury, a finding of either one of which in plaintiff's favor entitled it to a verdict, 1st, whether there was a partnership agreement between Richards and Williams, and the latter authorized to borrow money and bind the firm, and 2nd. whether Richards had ratified the transaction. There was a general verdict for the plaintiff.

This Court on Writ of Error *held*:

That the submission of the first issue to the jury was improper not being authorized by the evidence, and that as it did not appear from any special finding or otherwise, that the verdict was based upon any ratification by Richards, it was reversible error. It would seem from the report of the case, that counsel contended that the error was harmless, and did not vitiate the verdict; at any rate the court decided the point, and in disposing of it Judge Gilbert said: "If it appeared from a special finding or otherwise, that the jury's verdict was based on the ground that Richards subsequently ratified the act of Williams, we might pass over this assignment of error as harmless; but the verdict being general we cannot say that the erroneous instruction so given did not affect the result."



So in this case at bar. The verdict is general. It does not appear from a special finding or otherwise, whether the verdict was based upon a finding that the damage resulted from an Act of God "relieving from all liability." (Rec. 388). or upon a finding that the damage was caused by an Act of God contributed to by the negligence of the defendants, but which would have happened if defendants had not been negligent. (Rec. 390) ; or upon a finding that the flood was an ordinary one, and defendants were free from negligence. If the verdict was based upon either of the first two it was based upon instructions twice decided by this Court to be erroneous. Yet how can the Court say it was not? What is there in the record to even indicate that it was not? Absolutely nothing. Yet your Honors say in your opinion that we "cannot complain if the verdict was reached upon the ground that the damages were caused by inevitable accident as the result of vis major or Act of God, against which one cannot reasonably be expected to guard, provided the correct rule was stated as it was in substance; that if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been anticipated or foreseen, verdict should be for the defendants; but that if the damage could have been reasonably anticipated as resulting from the construction of the bulkhead or flume defendants would be liable." This deduction we think untenable even as stated by yours Honors, but it is assuredly untenable when it is found that in one of the instructions complained of an Act of God is



defined as one "relieving from all liability," and in another the jury are permitted to find for defendants if they find that the damage was caused by an Act of God contributed to by the negligence of the defendants and for which they would be liable "unless the damage would have happened if the (defendants) had not been negligent." (Rec. 390). That is, that the damages being caused by an Act of God, would have occurred in any event, and defendants were therefore not liable for contributing thereto.

Our position on this question is, we think, strengthened, if it needs strengthening by consideration of another element that entered largely into the case. The record shows that during the existence of the town of Juneau, until about 1913 or 14 the flats composing the delta at the mouth of Gold Creek had not been settled or built upon. There was nothing there to be damaged by floods and nothing to attract attention to flood waters. Beginning in 1913, and during 1914, and '15, defendants attempted to reclaim this low ground lying to the southwest of plaintiff's lot, and between the bulkheaded channel and the channel commonly referred to as the main channel, which was subject to being flooded at every period of high water, by confining the creek to one channel, the one confined by the bulkheads. Between the time of the construction of the bulkhead channel and the date of the flood, Sept. 26th, 1918, defendants sold many lots on the delta, and the area had been covered with many dwellings. The flood of Sept. 26th, 1918 was the first high water after this condition had been brought about, and was the first time

that any persons or property had ever been exposed to danger from flood waters in that creek. As a consequence, there was great excitement in the little town on that day. Plaintiffs' home, and two or three contiguous houses, all situated on the highest ground in the whole flat, were being undermined and washed away by the strong current diverted against them by the broken and choked flume. The fire department was called out, and many volunteers who had never before particularly noticed the creek in flood went down to the scene. The sight of persons and property exposed to danger, the crowds, the excitement, all contributed to heighten the sense of a catastrophic phenomenon. Now all this atmosphere, the defendants injected into the trial by calling a cloud of witnesses whose testimony this Court holds did not even lend to establish the point upon which they were called. Under such circumstances the trial court should, in simple justice to plaintiffs, not only have been strictly accurate in the instructions given, but so guarded them as to remove this extraneous matter so favorable to the defendants claim of the defense of Act of God. This was not done. On the contrary the issue of an Act of God, was, without evidence to sustain it, given to the jury. An Act of God was defined in one place in the instructions as something "relieving from all liability." It is true that at another place, the correct rule, based however upon the erroneous assumption of an Act of God, was given, to the effect that if the negligence of defendants contributed to the damage they were liable, yet this was again modified by an instruction that

authorized a finding for defendants on the theory that the flood was an Act of God so catastrophic that the damage would have occurred regardless of plaintiffs negligence. And all this in the face of the decision of this Court that there was no evidence tending to show any such state of fact.

We believe that a perusal of the record will convince every fair-minded person that the trial below resulted in a miscarriage of justice. That miscarriage, we think, was caused by errors of the lower court, assignment of which this court in its opinion sustains. But surely it cannot justly be said that it appears from the record that those errors did not affect the result.

Your Honors, say in closing the opinion: "The facts having been found against the plaintiffs, and there being no prejudicial error of law, the judgment will be sustained."

What facts were found against plaintiffs? Did the jury find that the flooding "was due to natural causes, directly and exclusively without human intervention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of defendants?" The instructions of the lower court authorized such a finding, yet this court has twice held that the testimony "fell far short of proving" that. Were the facts found against plaintiffs these: that the damage was due to an Act of God relieving against all liability? or that the flooding was due to Act of God, contributed to by the negligence of defendants, and for which they would have been liable, but the jury further found that the damage would have occurred even if de-

fendants had not contributed thereto because it was an Act of God? For the court instructed the jury that "where an injury is the combined result of the negligence of the defendant and of an accident for which he is not responsible, he must pay damages, unless the damage would have happened if he had not been negligent." Rec. 390. This is not the law, but was given as a modification, or limitation, of instructions which your Honors held cured the errors pointed out in the assignment, twice sustained by this court.

These considerations, we think, lead inevitably to the conclusion that it cannot be said that the facts which should legally and properly have been submitted to the jury were decided against plaintiffs. The verdict may have been based solely upon findings wholly without support in the evidence, in which case the errors of the lower court were indeed prejudicial, and deprived plaintiffs of a fair or legal trial.

Your Honors, in your opinion, after holding that the issue of the Act of God should not have been submitted to the jury, also say: "But the elimination of that question does not compel the conclusion contended for by plaintiffs that defendants were liable for the damages caused by the flooding, for there still remained the question whether the flooding which caused the damage was attributed to the negligence of the defendants." Very true; but as already pointed out, it may well be, and most probably was, that the jury never considered or decided that question at all, erroneously finding that the damage was due solely to an Act of God, and con-

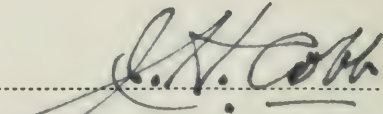
ceiving in the light of the courts instructions that that settled the case against plaintiffs.

In conclusion we most earnestly pray that the court will be pleased to grant a rehearing, and upon such rehearing to reverse the judgment below, and grant a new trial.

Respectfully submitted,  
J. H. COBB,  
Attorney for the Plaintiffs in Error,  
and Petitioners.

---

I HEREBY CERTIFY that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.

  
.....  
Attorney for Plaintiffs in Error  
and Petitioners.



United States 5  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

WILLIAM FISHER, Supervising Inspector for the  
Eleventh District of Steamboat Inspection  
Service, Department of Commerce of the  
United States, and DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Appellants,

vs.

JOHN ALWEN,

Appellee.

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**Transcript of Record.**

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Upon Appeal from the United States District  
Court for the Western District of Wash-  
ington, Northern Division.

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FILED

MAY 1 1902

F. D. MONGKTON,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM FISHER, Supervising Inspector for the  
Eleventh District of Steamboat Inspection  
Service, Department of Commerce of the  
United States, and DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
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Upon Appeal from the United States District  
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ington, Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names and Addresses of Counsel.**

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Appellants,

310 Federal Building, Seattle, Washington.

DE WOLFE EMORY, Esq., Assistant United States Attorney, Attorney for Appellants,

310 Federal Building, Seattle, Washington.

HOWARD G. COSGROVE, Esq., Attorney for Appellee,

2001-2003 L. C. Smith Building, Seattle, Washington. [1\*]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 276—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, DONALD AMES and HARRY C. LORD, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States,

Defendants.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

### **Complaint.**

Plaintiff complaining of defendants for cause of action states and alleges:

#### **I.**

That the said defendant William Fisher was, on the 1st day of April, 1921, ever since has been, and now is a resident and citizen of the city of Seattle, State of Washington, and the duly appointed, qualified and acting Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States with headquarters at Seattle, Washington.

#### **II.**

That the said defendants Donald Ames and Harry C. Lord were on the 1st day of April, 1921, ever since have been, and now are residents and citizens of the city of Seattle, State of Washington, and respectively United States Inspector of Hulls and United States Inspector of Boilers, Steamboat Inspection Service, Department of Commerce of the United States, together making the local Board of Steamboat Inspectors for said [2] Steamboat Inspection Service, Department of Commerce of the United States and with headquarters at Seattle, Washington.

#### **III.**

That the said plaintiff is a resident and citizen of the city of Seattle, State of Washington.

#### **IV.**

That the said plaintiff is by occupation a master mariner and has devoted his lifetime to that avo-



cation and by reason thereof has become and is specially fitted to serve as a master mariner. That by reason of having devoted all his time to this particular occupation he has been unable to educate himself or gain any experience in any other occupation; that unless he is enabled to follow and pursue his said calling as a master mariner he will be unable to support himself and those dependent upon him; that since October, 1898, he has held from the United States an unlimited ocean license as master of steam vessels and that since the 2d day of December, 1918, he has held and does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and adjacent inland waters, Honolulu harbor, Columbia Bar from Astoria, San Francisco Bay from Benicia and San Francisco, each to sea, also San Pedro harbor to sea, said license being numbered 73609, issue No. 5, 5, and being for the period of five years from date of issue.

#### V.

That the value of said license to the said plaintiff is more than the sum of three thousand dollars (\$3,000.00).

#### VI.

That on and during the 1st day of April, 1921, the said plaintiff was the duly appointed and acting master of the United States steamboat "West Hartland"; that on said date said vessel [3] collided with the steamboat "Governor" in the vicinity of Point Wilson, Washington, in the waters of Puget Sound.

## VII.

That the said defendants Donald Ames and Harry C. Lord, as said local Board of Steamboat Inspectors, immediately upon said collision taking place directed a hearing to be had before said Board as to the causes and responsibility for said collision; may witnesses were summoned by said Board and after being duly sworn, testified concerning said collision and among them was the said plaintiff. After taking all of said evidence and having duly considered the matter, the said Board on the 16th day of April, 1921, made and entered their findings and decision fully and completely exonerating the said plaintiff from all blame or responsibility for the cause of said collision, said findings and decision being in writing, a copy of which is hereto attached, marked Plaintiff's Exhibit "A" and made a part hereof.

## VIII.

That neither the said plaintiff nor any party lawfully interested in or to said findings and decision appealed therefrom to the said Supervising Inspector, nor has said Supervising Inspector filed any charges with the said local Board, against the said plaintiff, and the time has long since expired within which any such appeal could have been taken.

## IX.

On or about the 17th day of May, 1921, the said plaintiff received from the said William Fisher as such Supervising Inspector a letter preferring certain charges against the said plaintiff, said charges

relating to the said plaintiff's conduct as master of said "West Hartland" at and about the time of said collision, a copy of which letter is attached hereto, marked Plaintiff's [4] Exhibit "B" and made a part hereof.

#### X.

That the said plaintiff protested to the said defendant William Fisher, as such Supervising Inspector, against his right to make such charges or to hold such hearing in the manner and form and in the time made or at all or in anywise, and particularly reserving any and all rights which he had or might have in the premises, appeared before said Supervising Inspector, who proceeded to hold a hearing.

#### XI.

That on the 23d day of July, 1921, the said plaintiff received from the said defendant William Fisher, as such Supervising Inspector, certain documents purporting to be his findings relative to said collision as affecting the said plaintiff and purporting also to be the said Supervising Inspector's decision and order purporting to suspend for a period of two years from July 22, 1921, plaintiff's said license and further ordering the said plaintiff to deposit his said license in the office of the United States Local Inspectors at Seattle during the period of its suspension. A copy of said findings, said decision, and the accompanying letter of the said Supervising Inspector are hereto attached, marked plaintiff's Exhibit "C," and made a part hereof.

## XII.

That the said plaintiff, protesting against the claimed right of the said defendant William Fisher, as such Supervising Inspector, to make such charges, or any charges, or to hold such hearing in the manner and form made and held, or in any manner or form in the premises, or to make such findings or order, or any findings or order at all in the premises, and without waiving any of his rights in the premises, appealed to the Supervising Inspector General of the United States Steamboat Inspection [5] Service. That on or about the 30th day of August, 1921, the said plaintiff received from F. C. Reagan, who as his attorney had prepared and presented his appeal to said Supervising Inspector General, a letter received by the said Reagan from the said Supervising Inspector General, a copy of which letter is hereto attached, marked Plaintiff's Exhibit "D," and made a part hereof.

## XIII.

That the said findings and decision of the Supervising Inspector and the said decision as set forth in the letter of the said Supervising Inspector General to the said Reagan have by some unknown person been given publicity through the newspapers, although neither of said decisions or orders have been filed with said Local Board of Steamboat Inspectors.

## XIV.

That said plaintiff has since the 23d of July, 1921, diligently sought to obtain employment and particularly employment as master and/or pilot



under such license, but on account of and by reason of the said wrongful, unauthorized and illegal findings, decision and order of said Supervising Inspector and the wrongful, unauthorized and illegal decision and order of said Supervising Inspector General and the publicity given thereto and thereof has been unable to secure such particular employment, or any employment at all, other than that as temporary watchman of a laid-up vessel; that until the relief requested herein is granted said plaintiff will be unable to serve as master and/or pilot of any vessel or to secure any employment bringing in sufficient remuneration to support himself and his dependents.

#### XV.

That the said defendant William Fisher, as said Supervising Inspector, threatens to enforce his said order suspending the said license of the said plaintiff. [6]

#### XVI.

That all of the proceedings, hearings and orders of the said defendant Fisher, as said Supervising Inspector, and the said Supervising Inspector General, which have been made or which may be made affecting or pretending to affect the right of the said plaintiff to serve as master under said license by reason or on account of the conduct or actions of the said plaintiff as master of said "West Hartland" immediately preceding, at and immediately after the said collision are null and void but nevertheless of such force and character as to effectually deprive the said plaintiff of an opportunity



to serve as master and/or pilot under said license, in that no one will give him any such employment and he is thereby irretrievably damaged.

#### XVII.

That by reason of said wrongful, unlawful and illegal proceedings, hearings, findings, decisions and orders, and each of them, of the said defendant William Fisher, as said Supervising Inspector, and the said Supervising Inspector General, and each of them, said plaintiff has been deprived of a valuable property right, to wit, the right to serve as master and/or pilot under his said license, all without due process of law.

#### XVIII.

That plaintiff has no plain, speedy and adequate remedy at law in the premises.

NOW, THEREFORE, said plaintiff prays:

1. That the said defendant William Fisher, as Supervising Inspector, be perpetually enjoined from filing with said local Board his said findings, decision and order, or either or any of them, or any decision or order, or any findings, decision, or order in anywise reversing, changing or modifying the said findings and decision of the said local Board as to the said plaintiff or his license, or from doing anything tending to [7] reverse, modify or change said decision and order of said local Board as to the said plaintiff or his said license.

2. That said defendant William Fisher be perpetually enjoined from doing anything toward enforcing his said decision and order.

3. That the said defendant William Fisher be perpetually enjoined from any interference with plaintiff's services or right to serve as master and/or pilot under said *said* license on account of or by reason of plaintiff's conduct just before, at, or immediately following said collision.

4. That said defendants Donald Ames and Harry C. Lord, as such local Board, be perpetually enjoined from placing on file with the records of said local Board, or from complying with, recognizing or receiving any findings, decision or order of the said defendant William Fisher as Supervising Inspector, or from the said Supervising Inspector General, or anyone else, tending to modify, change or reverse their said decision as such local Board as to the said plaintiff; and that they, as such Board, and each of them be perpetually enjoined from cancelling or suspending the said license of the said plaintiff for or on account of his actions or conduct immediately preceding, at or immediately following said collision.

5. That said pretended findings, decision and order of the said defendant William Fisher, as Supervising Inspector, and the said pretended decision and order of the said Supervising Inspector General be declared null and void.

6. That if prior to the final order of the Court herein the said defendant William Fisher, as such Supervising Inspector, or the said Supervising Inspector General shall file with said local Board any findings, decision or order in anywise reversing, changing or modifying the said decision of the

[8] said local Board, or tending in anywise to suspend or cancel the said license of the said plaintiff, or direct any interference therewith or the use thereof by said plaintiff, or service by said plaintiff thereunder on account of or by reason of the actions or conduct of the said plaintiff immediately prior to, at, and immediately following said collision, the said defendants Donald Ames and Harry C. Lord be ordered to file with the clerk of this court each and every of such findings, decisions and orders making a report in writing thereof to said Court and deliver to record counsel of plaintiff herein a copy of such report, together with a copy of such findings, decisions, or orders, and that said findings, decisions and orders and each of them be declared null and void and that the clerk of said court be directed to so stamp each of such findings, decisions and orders.

7. And for such other and general relief as may seem meet and agreeable to the Court.

JOHN ALWEN,  
Plaintiff.

HOWARD G. COSGROVE,  
Attorney for Plaintiff.

State of Washington,  
County of King,—ss.

John Alwen, being first duly sworn, on oath deposes and says: That he has read the foregoing complaint in equity, understands and knows the contents thereof, and that the same is true.

JOHN ALWEN.

Subscribed and sworn to before me this 7th day of September, 1921.

[Notarial Seal] HOWARD G. COSGROVE,  
Notary Public Residing at Seattle, Washington.

[9]

**Plaintiff's Exhibit "A."**

File No. 3559.

Office of Local Inspectors,  
Seattle, Washington.

April 16, 1921.

IN THE MATTER OF THE INVESTIGATION  
OF THE COLLISION BETWEEN THE S. S.  
"GOVERNOR" AND "WEST HARTLAND"  
ON APRIL 1, 1921, OFF POINT WILSON,  
RESULTING IN THE SINKING AND  
TOTAL LOSS OF THE S. S. "GOVERNOR."

**FINDINGS.**

We hold that Harry H. Marden, while in charge of the S. S. "Governor" March 31st and April 1st, 1921, under authority of a license as Master of Pacific Ocean, coastwise steamers, also Pilot on waters of Puget Sound and adjacent inland waters, Serial No. 67609, Issue No. 4, 14, issued at Seattle, Washington, October 5, 1917, violated Title 52, Section 4442, U. S. Revised Statutes, specifically—"Inattention to the duties of his station," in not leaving the pilot house, the windows of which were closed, in response to the report of the lookout and bridge quartermaster that certain lights were in close proximity, which violation resulted in the col-



lision between the S. S. "Governor" and S. S. "West Hartland." We hold that Ernest Kellenberger, Second Mate on the S. S. "Governor," holding a license as Chief Mate of steam vessels, any ocean, and who was on watch with the pilot at the time of the collision, violated Title 52, Section 4442, U. S. Revised Statutes, specifically—"Inattention to the duties of his station," in not keeping a proper lookout after relieving the Third Mate to take the 12:00 to 4:00 watch, A. M. April 1, 1921, when the steamer lights were in plain view and had been previously reported, and which inattention resulted in disaster to his vessel. He was at this time in official charge of the S. S. "Governor." We also hold that Arne Hage, Third Mate in official charge of the S. S. "Governor," before 12:00 o'clock, and who was on watch with the pilot at that time, violated Title 52, Section 4442, U. S. R. S., specifically,—“Inattention to the duties of his station” in not leaving the pilot house, the windows of which were closed, in response to the report of the lookout and bridge quartermaster that certain lights were in close proximity, which violation resulted in the collision between the S. S. "Governor" and the "West Hartland."

The "West Hartland," having discharged her pilot off Port Townsend, had set a course to pass Point Wilson that would cross obliquely the course of any vessel passing Point Wilson on a course laid within  $\frac{3}{8}$  or so of a mile off Marrowstone Point. When the master of the "West Hartland," Capt. John Alwen, who had personal charge of the navigation of the vessel, at the time, first saw the



approaching lights of the "Governor" he realized that the vessels were developing a crossing situation. He watched the approaching lights anxiously but abided by the provisions of the crossing rule. Crossing Rule—Rule VII. When two steamers are meeting at right angles or obliquely, viz.: the vessel having another on her own starboard side must give way to the other, the latter to hold her own course and speed. This makes the latter vessel a "privileged" [10] vessel under the law, as the vessel having the right of way must keep her course and speed, and the other vessel may assume that she will do so. This renders it obligatory on the vessel which has the right of way to pursue her course at the speed she had been keeping up previously. She must rely on the other vessel to avoid collision, and not embarrass her by any maneuver. All she need do is do nothing. Then the other vessel knows what to expect and navigates accordingly. This rule applies to all the other steering and sailing rules. Under it, when a sail vessel is running free keeps out of the way, the closehauled vessel keeps her course. Between two crossing steamers, when the one on the left keeps out of the way, the other keeps her course. Between a steamer and a sail vessel, when the steamer keeps out of the way, the said vessel keeps her course. The principle is the same in all these different contingencies.

Sec. 155, U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. This rule the "West Hartland" was endeavoring to follow until the master saw that a collision was imminent when he reversed his engines to full speed

astern in an effort to lessen the force of the impact that must follow, a privilege granted him under Rule XI of the inland pilot rules, which reads as follows: "In obeying and construing these rules due regard shall be had to all *dangers of navigation and collision* and to any SPECIAL CIRCUMSTANCES which may render a departure from the above rules necessary in order to avoid immediate danger." The expression "if necessary" does not mean essential but prudent or expedient, to the mind of a mariner of skill. As Capt. John Alwen, master of the S. S. "West Hartland" acted in accordance with these principles, he is absolved from all blame.

Capt. Edward P. Bartlett, master of the S. S. "Governor" not being in charge of the navigation of that vessel up to the time of the collision between the vessels, is absolved from all blame. He had gone to his room after sighting Point Wilson ahead and assured himself that all was going well, before the vessel had reached that point. He took command immediately on hearing whistle signals between the vessels and by his intelligent supervision of the debarkation of the survivors everything worked smoothly under the trying circumstances incident to a disaster of this character.

(Sgd.) DONALD AMES,  
HARRY C. LORD,  
U. S. Local Inspectors.

**Plaintiff's Exhibit "B."**

**DEPARTMENT OF COMMERCE.**

Steamboat-Inspection Service.

In reply refer to  
File No. 788/1.

Office of Supervising Inspector,  
11th District,  
Seattle, Wash.

May 18, 1921.

Captain John Alwen,  
2023 Boylston Ave. North,  
Seattle, Washington.

Sir:

You are hereby charged with violation of the U. S. Revised Statutes, sections 4439 and 4450, with negligence, unskillfulness and inattention to your duties as master of the steamship WEST HARTLAND on the night of March 31, 1921, and the morning of April 1, 1921, in this, that being in doubt as to the course and intention of the Steamship GOVERNOR as that vessel and the WEST HARTLAND were approaching each other, you failed to signify your lack of understanding, which resulted in the collision between the WEST HARTLAND and the GOVERNOR; and further, in this, that having signalled the GOVERNOR of your intention to hold course and speed you failed to do so but without informing the GOVERNOR thereof you stopped and reversed engines, which resulted in the collision between the WEST HARTLAND and the GOV-

ERNOR; and further, in this, that when the collision was imminent you did not take proper measures to avoid the collision which resulted in the collision between the WEST HARTLAND and the GOVERNOR.

At your earliest convenience you are directed to appear at this office to make answer to those charges. You may be represented by counsel if you so desire.

Respectfully,

(Sgd.) WILLIAM FISHER,

Supervising Inspector, Eleventh District.

W. [12]

**Plaintiff's Exhibit "C."**

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

In reply refer to

File No. 788/1.

Office of Supervising Inspector,  
11th Dist.

Seattle, Wash., July 22, 1921.

Captain John Alwen,  
2023 Boylston Ave. North,  
Seattle, Wash.

Sir:

Herewith please find copy my findings, conclusions and decisions in the matter of your recent trial. A copy of my decision addressed to you is in the same mail.

Respectfully,

(Sgd.) WILLIAM FISHER,

Supervising Inspector, Eleventh District.

W.

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

In reply refer to  
File No. 788/1.

Office of Supervising Inspector,  
11th District,  
Seattle, Wash.

July 22, 1921.

Captain John Alwen,  
2023 Boylston Ave. North,  
Seattle, Wash.

Sir:

I hold and it is my decision that you are guilty of negligence, unskillfulness, and inattention to your duties as Master of the S. S. WEST HARTLAND on the night of March 31, 1921, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. GOVERNOR.

Your license as Master and Pilot, No. 73609, issue number 5, 5, dated December 2, 1918, is hereby suspended for a period of two years from this date, July 22, 1921.

You are directed to deposit your license in the office of the U. S. Local Inspectors at Seattle for custody during the period of its suspension.

Respectfully,

(Sgd.) WILLIAM FISHER,

Supervising Inspector, Eleventh District.

F/W. [13]



## DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

In reply refer to

File No. 788/1.

Office of Supervising Inspector,  
11th District,  
Seattle, Wash.

July 22, 1921.

IN THE MATTER OF THE TRIAL OF  
CHARGES PREFERRED BY THE U. S.  
SUPERVISING INSPECTOR, ELEVENTH  
DISTRICT, AGAINST CAPTAIN JOHN  
ALWEN, MASTER OF THE S. S. WEST  
HARTLAND, IN CONNECTION WITH  
THE COLLISION BETWEEN THAT VES-  
SEL AND THE S. S. GOVERNOR ON THE  
MORNING OF APRIL 1, 1921.

This proceeding arises out of the collision between the S. S. WEST HARTLAND and the S. S. GOVERNOR, which occurred shortly after midnight April 1, 1921, and as a result of which eight persons lost their lives, and the Governor, a passenger liner valued at \$2,250,000.00 was sunk.

The Board of Local Inspectors after an investigation rendered a decision April 16th, exonerating Captain Alwen of the West Hartland from all blame. A careful reading of the testimony taken at the investigation convinced me that the conclusion of the Local Board in this regard was not warranted by the evidence then before them. Acting in accordance with my duty as Supervising Inspector (Act of June 10, 1918) and following the instructions of the

Department as to the proper procedure, I filed charges against the Master of the West Hartland.

The proceedings against the Pilot of the Governor are before me in another case, but are not involved here. For the purpose of this decision, it may be conceded that Captain Marden was culpable in his management of the Governor; this case is solely as to the participation of Captain Alwen; Was he free from blame or was he negligent, unskillful, or inattentive to his duties in respect to the matters set forth in the charges. To reach a correct solution of this question hypothetical questions, based upon assumed positions of the ships, throw very little light.

After reviewing all the testimony given in the case, both before the Local Board and myself, and endeavoring to reconcile the frequent conflicts in the evidence, I find the facts to be as follows:

### FINDINGS.

The West Hartland is a freighter of 6167 gross tons (8800 tons dead weight), 410 feet in length, equipped with 2500 horse power turbine engines. On the night in question, March 31, 1921, she left Port Townsend, after putting ashore her pilot, at 11.50 p. M. She was deeply laden (24' 8" forward 23' 5" aft) and steering sluggishly. Starting at rest at a point more than  $\frac{3}{4}$  of a mile off shore, she was put on a course N. N. W., toward the open waters of Admiralty Inlet and Puget Sound; at 11.59 she had attained a speed of about 5 knots; at 12.02, 6 knots, and would not have reached her full speed of 8 $\frac{1}{2}$  knots until about 12.05.

Meanwhile, at 11.54, the Master and the third officer [14] observed the Governor approaching on a crossing course. She was brightly lighted and her identity, speed and destination were immediately known to them as is evidenced by Captain Alwen's first comment, "Hello, there's the Governor."

The latter vessel with 305 persons on board was en route from Victoria to Seattle, traveling at a speed of about 15.4 knots per hour. The approach of the West Hartland was not observed by the officers of the Governor because the red side light and range lights of the West Hartland were confused with a bright red light on the dock at Port Flagler, and a number of bright lights above and in the vicinity of the dock, the vessel and dock bearing about in line from the Governor.

A few moments after noting the appearance of the Governor, Captain Alwen remarked to the third officer, "It's about time for her to do something."

Again, shortly after midnight he said to the second officer, "What is he trying to do."

To which the latter responded, "He is probably trying to cross us."

At about this same time, the Quartermaster on watch overheard the Captain say to himself, "I wonder what that fellow is going to do."

All this time the vessels were rapidly approaching each other without any signals being exchanged. Any signal from the West Hartland during these five or six crucial minutes would have saved the situation, but no signal was given.

Not until a time which the weight of the evidence fixes at within a minute and a half of the collision did Captain Alwen sound his whistle.

The collision occurred at 12.04 or 12.04½ A. M. With the exception of the bridge log of the *West Hartland*, in which the entries were made after the accident, and are disputed by Captain Alwen, the testimony of the witnesses as to the time elapsing between the first whistle and the collision may be summarized as follows: Captain Alwen's single blast was immediately answered by three blasts from the Governor; the telegraph signal to the engine room was given between the single blast and the answer. The second officer of the *West Hartland* testified that he operated the telegraph before he heard the three whistles from the Governor and that the one whistle, operating the telegraph, and the three whistles occurred as close together as possible. The chief engineer of the *West Hartland* heard the telegraph before he heard the three whistles, and the third mate of the *West Hartland*, who was standing in the chart room three feet from the door, upon hearing one whistle followed immediately by three whistles, opened the door as quickly as he could and was just entering the door when he heard the telegraph ring. Only one signal was received in the engine room before the collision "full speed astern," and the original record made of this by the water tender fixes the receipt of this signal at one minute before the collision. Passengers on the Governor heard the single blast answer at once by three blasts



and the crash followed almost at once, within a fraction of a minute. [15]

That the vessels were very close together at 12.03 can be proven in another way. The Governor's course prior to the collision was S. 68 degrees E. and her average speed was 15.4 knots or a knot in 3.9 minutes. The West Hartland was making not less than 6 knots, a knot in 10 minutes. The vessels were approaching the convergence of their course lines at a combined speed of 2168 feet, or more than a third of a nautical mile a minute. Captain Alwen is positive that the vessels were three quarters of a mile apart at 12.01, or 4560 feet. In that situation, the vessels would reach the intersection of their course lines about 12.03. Mr. Colby puts the distance apart at 12.01 as about six lengths or 2466 feet and in that situation they would reach the point of collision before 12.03. Mr. Ahrens puts the distance apart at 12.03 as  $2\frac{1}{2}$  or 3 lengths, or 1000 to 1200 feet. Mr. Lane realized that the vessels were getting close just prior to the collision but thought the Governor had plenty of time to get by. He testified he was no judge of distance and had no idea how far apart they were. Captain Marden places the distance apart at 12.03 as one quarter of a mile or 1520 feet. Mr. Kellenberger puts the distance at less than a quarter of a mile, "So close it was instinctively realized that she was going to hit, so close we all stood there holding our breath knowing she was going to hit, no possible chance to get out of it." Mr. Hage walked along the dock a distance



of about 50 feet between the one whistle and the collision.

### CONCLUSIONS.

From the testimony, I cannot escape the following conclusions:

“(1) As the vessels approached each other, the Master of the *West Hartland* was in doubt as to the course and intention of the Governor. It is my opinion that when Captain Alwen declared, ‘it is time for the Governor to do something,’ it was then time for him to find out what the Governor was going to do and until he had that information he was in doubt as to the intention of the Governor. His doubt was shown very plainly by his question to the second officer, ‘What is he trying to do,’ and his doubt was expressed when he said, ‘I wonder what that fellow is going to do.’ It was especially necessary for him to know the intention of the Governor because the constantly accelerating speed of the *West Hartland* made it impossible for either vessel to determine whether there was risk of collision. Knowing that it was time for the Governor to do something and being in doubt about what that action would be, he continued on a crossing course without any indication from the Governor, and about seven minutes later the vessels collided sinking the Governor with a loss of eight lives and a property loss of over \$2,5000,000.

“Captain Alwen’s claim that bearings taken of the Governor indicated that she was crossing

safely is not borne out by his question to the second officer, 'What is she trying to do,' and his talking to himself in the pilot house saying, 'I wonder what that [16] fellow is going to do.' Both remarks were made after the time he claims to have taken the bearings. His first assumption may have been that she would cross in front of him; the fact remains that his first and only signal was to the effect that he would cross the Governor. Bearings taken before midnight would be of no value in determining the risk of collision later, because the speed of the West Hartland was accelerating very fast as she approached her maximum momentum. The opening of the range lights of the Governor can be accounted for by the convergence of the course lines of the two vessels.

“(2) Being in doubt as to the course and intention of the Governor, Captain Alwen failed to signify the fact by any signal until a catastrophe was imminent. The law and ordinary prudence impose on any vessel in doubt the duty of ascertaining the intentions of the other vessel. The safety of vessels and the lives on board depend upon no chances being taken by either vessel and, when the failure of one vessel is apparent, or should be apparent, or where there is doubt from any cause, this doubt should be indicated in ample time for exchange of signals to permit each vessel to safely maneuver. When Captain Alwen observed the green light of the Governor bearing on his port

bow in such a manner as to make it apparent that the Governor was crossing the bow of the West Hartland and was persisting in this course, and giving no indication of any intention to change her course, her action causing Captain Alwen to ask the second officer, 'What is she trying to do,' and to remark, 'I wonder what that fellow is going to do,' there was apparent danger of collision. The very fact that a crossing such as the Governor was about to make is a violation of the law, it seems to me should have aroused doubt in any prudent and skilful navigator and caused him to blow timely danger signals.

"(3) Having delayed giving a signal until too late, Captain Alwen blew one blast signifying that he would hold his course and speed and then immediately put his engines full speed astern. In other words, having claimed his right of way and immediately receiving a signal from the Governor that she was backing full speed, Captain Alwen, instead of keeping his signified course and speed, also backed up and thus kept the two vessels in the same relative situation. As justification for his action, Captain Alwen and his counsel cite the rule applicable '*in extremis*,' which permits disregard of rules when collision is imminent. He is, however, in this dilemma: As heretofore noted, his whistle and signal to the engine room were almost simultaneous. If the ships were then '*in extremis*' there remained no opportunity to

maneuver after the first whistle was blown and Captain Alwen stands self convicted of unwarranted delay in sounding some signal. Contrary to this is the testimony of Captain Alwen that he was backing for nearly two minutes before the collision, had taken about a knot off his speed and had time to signal the Governor of his changed intention. If this be true, then Captain Alwen went contrary to his expressed intention, failed to signify [17] a change and thereby contributed to the disaster.

“(4) The privileged ship is not free to proceed into a dangerous situation or act in disregard of the maxim ‘Safety first.’

“The decision of the Local Board puts, it seems to me, too broad an application on the well known rule that the ship having the right of way shall hold her course and speed. Even should it be conceded that a ship whose speed is constantly accelerating comes within the rule, though the nature of her maneuver is unknown to the burdened ship, yet it cannot be said that ‘All she (the privileged ship) need do is do nothing.’ Such a rule would encourage disregard of the sacred obligation to preserve human life, and would, if literally pursued, result in an attitude on the part of those inclined to recklessness which would constitute a menace to safe navigation. While this proceeding is not in any sense a law suit,—on the contrary it pertains solely to a license issued by this department—yet it is proper to note that



the highest legal authority has frequently recognized that the privileged ship, as well as the burdened, is bound to use all possible skill and prudence to avoid putting human life in danger; and when danger looms ahead the officer in charge must exert caution and skill in the discharge of his important duties.

“In this case every consideration demanded that an understanding be had as to the Governor’s intention *before the point of danger was reached*. From a background of high land with many bright lights and deep shadows, Captain Alwen was putting out with his deep laden 8800 ton turbine ship; she was down by the head 1’ 3”; she steered sluggishly; the Governor appeared and took a course that put him in doubt; a situation of danger was developing. Would she cross in front or behind him? The mere sounding of his whistle would determine it, yet he kept on until a position was reached when the immediate answering of his one whistle put him *‘in extremis.’* The opportunity for prudence was then passed; he indicated that he would hold his course and speed; the Governor reversed to comply if possible with his signal, and then he reversed and the two ships came together.

#### DECISION.

“I therefore hold and it is my decision that Captain John Alwen is guilty of negligence, unskillfulness, and inattention to his duties as Master of the S. S. West Hartland on the night



of March 31, 1921, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. Governor, and his license as master and pilot, No. 73609, issue number 5, 5, dated December 2, 1918, is hereby suspended for a period of two years from this date July 22, 1921. Captain Alwen is directed to deposit his license with the U. S. Local Inspectors at Seattle, where it will remain during the period of its suspension.

(Sgd.) WILLIAM FISHER,  
Supervising Inspector, Eleventh District." [18]

**Plaintiff's Exhibit "D."**

Copy.

In reply refer to

AEK.

File 81438.

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

Washington.

August 23, 1921.

Chief Clerk.

1921 Aug 24 AM 9/31

F. C. Reagan, Esquire,

Office of United States Attorney,

Department of Justice,

Seattle, Washington.

Sir:

1. The Bureau is in receipt of your letter of the 15th instant, enclosing notice of appeal by Captain John Alwen, Master of the S. S. WEST HART-

LAND, from the decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service at Seattle, Washington, in the matter of the collision between the S. S. GOVERNOR and the S. S. WEST HARTLAND on April 1, 1921, made and rendered July 22, 1921.

2. It is observed that the notice of appeal is signed by John Alwen, Master, S. S. WEST HARTLAND, and countersigned by yourself as Attorney for Captain John Alwen, Master of S. S. WEST HARTLAND.

3. Receipt is also acknowledged of the brief of Captain John Alwen, signed by you as his attorney, submitted in connection with his appeal from the decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service, Seattle, Washington, made and rendered July 22, 1921.

4. In reply, you are advised that your brief has been very carefully read, thoroughly analyzed, and comprehensively digested. All the evidence adduced at the trial has been considered in all its phases and from every direction, and as to its purpose and effect.

5. In the opinion of the Bureau, your contention that the action of the Supervising Inspector was irregular and not authorized by the law, has no force, as that authority is fully covered by Sections 2 and 3 of the Act of Congress, approved June 10, 1918, and the Supervising Inspector proceeded correctly in his consideration of this case. The method

of obtaining evidence in cases of this character, its admission, application and purpose, is not governed by any rules of practice or procedure, and evidence may be secured in any manner that will best tend to elicit the information necessary or desirable in arriving at an intelligent and consistent conclusion and decision. The inuendo contained in your brief directed against the integrity and the impartiality of the Supervising Inspector deserves no consideration at my hand, and will be passed over without comment, as I believe that he has been eminently fair and impartial in his consideration of this important case, and that there has been no desire on his part to determine any other than a just and consistent conclusion.

6. The previous experience of the Supervising Inspector eminently fits him to determine responsibility for accident or casualty, and his judgment and discretion in such matters should have the most considerable attention. It is quite unnecessary to [19] undertake to answer in detail the various contentions of your brief, many of the contentions being reiterations of protest which add no strength to previous statements upon the same points, but it will suffice to say that I believe that the action of the Supervising Inspector was legal and perfectly regular, his conduct of the case was in accordance with intelligent and impartial procedure, and his conclusion and decision in accordance with the evidence adduced at the trial of Captain Alwen, and fully supported by the incidents attending the collision of the S. S.

WEST HARTLAND and the S. S. GOVERNOR  
on the night of April 1, 1921.

7. The decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service, Seattle, Washington, suspending the license of Captain John Alwen for two years from July 22, 1921, is affirmed and the appeal respectfully dismissed.

Respectfully,

(Signed) GEO. UHLER,

Supervising Inspector General.

MH.

Approved:

(?)

Assistant Secretary of Commerce.

Aug. 24, 1921.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 7, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the District Court of the United States, for the  
Western District of Washington, Northern  
Division.

No. 276—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of  
Commerce of the United States,

Defendants.

**Answer of Defendants.**

Now come the defendants above named, and for  
answer to the bill of complaint of the above-named  
plaintiff, filed in the above-entitled court and  
cause, admit, deny and allege as follows:

**I.**

The said defendants admit all of the allegations  
contained in paragraph numbered I of said com-  
plaint.

**II.**

The said defendants admit all of the allegations  
contained in paragraph numbered II of said com-  
plaint.



## III.

The said defendants admit all of the allegations contained in paragraph numbered III of said complaint.

## IV.

Answering the allegations of paragraph numbered IV of said complaint, said defendants admit that the said plaintiff is by occupation a master mariner, and has devoted his lifetime to that avocation; deny that by reason of having devoted all of his time to this particular occupation [21] he has been unable to educate himself or gain any experience in any other occupation; deny that unless he is enabled to follow and pursue his said calling as a master mariner he will be unable to support himself and those dependent upon him as alleged in the said paragraph numbered IV of said complaint, and admit that the said plaintiff has held the licenses alleged in said paragraph numbered IV of said complaint except as hereinafter alleged, and in this behalf defendants allege that on or about December 29, 1918, the license of the said plaintiff as master of steam vessels for all oceans and as pilot was suspended for a period of four months, which period of suspension was subsequently reduced to 3 months, because of negligence in not causing soundings to be taken in a locality where soundings could and should have been taken, and unskillfulness in the navigation of the steamship "Umatilla," which resulted on March 5th, 1918, in the stranding of said vessel and her ultimate loss on the coast of Japan, and

said defendants further allege that the said plaintiff does not now and has not at any time since July 22d, 1921, held any license as master of steam vessels, or as pilot, the license theretofore held by him having been on said July 22, 1921, suspended for a period of two years by the said defendant William Fisher, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, as shown by Plaintiff's Exhibit "C" attached to said complaint.

#### V.

Said defendants allege that they have no knowledge or information sufficient to enable them to answer the allegations contained in paragraph numbered V of said complaint, and therefore deny the same. [22]

#### VI.

Said defendants admit all of the allegations contained in paragraph numbered VI of said complaint.

#### VII.

Said defendants admit all of the allegations contained in paragraph numbered VII of said complaint.

#### VIII.

Except as herinafter specifically alleged said defendants admit all of the allegations contained in paragraph numbered VIII of said complaint.

#### IX.

Except as hereinafter specifically alleged, said

defendants admit all of the allegations contained in paragraph numbered IX of said complaint.

X.

Answering the allegations of paragraph numbered X of said complaint, said defendants allege: That on May 20, 1921, a hearing was commenced before the said defendant William Fisher, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, on charges preferred against the said plaintiff on May 16, 1921, for a violation of Sections 4439 and 4450, because of negligence, unskillfulness and inattention of the said plaintiff to his duties as master of the Steamship "West Hartland" on the night of March 31, 1921, and the morning of April 1, 1921, in connection with the collision of said vessel with the steamship "Governor." That pursuant to a charge and notice to appear dated May 16, 1921, a copy of which is attached to the complaint herein and marked Plaintiff's Exhibit "B," the said plaintiff, without any protest or objection whatsoever, appeared at said hearing [23] so commenced on May 20, 1921, in person and by counsel. That between said May 20, 1921, and June 21, 1921, numerous hearings were had upon said charge, at all of which the said plaintiff was present personally and by counsel, and at none of which did the said plaintiff object to or protest against the right of the said William Fisher to make such charge or to hold such hearings, and made no reservation of any rights whatsoever. That on June 21, 1921, and

during one of the hearings on said charge, the attorney for the said plaintiff moved to dismiss the charges so filed by the said William Fisher as they appeared in the record in the case, on the ground and for the reason that nowhere in the statutes of the United States or in the regulations issued by the Board of Supervising Inspectors, approved by the Secretary of Commerce, was the power or authority given to the Supervising Inspector to hear charges as such inspector had attempted to do in said proceeding. That upon said motion being overruled by the said defendant William Fisher, the plaintiff proceeded at said hearing to adduce evidence on his own behalf, without making any further or other objection to the right of the said William Fisher to hold said hearing in the manner and form the same was being had, and reserved no other claimed or alleged rights in the premises.

#### XI.

Said defendants admit all of the allegations contained in paragraph numbered XI of said complaint.

#### XII.

Answering the allegations of paragraph numbered XII of said complaint said defendants allege that upon the appeal referred to in said paragraph said plaintiff made no protest or objection further than that he in no way waived the question of jurisdiction or the right of the Supervising Inspector to prefer charges and hold a trial. [24]

#### XIII.

Said defendants admit all of the allegations con-



tained in paragraph numbered XIII of said complaint.

XIV.

Said defendants allege that they have no information or belief sufficient to answer the allegations of paragraph numbered XIV of said complaint, and therefore deny the same.

XV.

Said defendants admit all of the allegations contained in paragraph numbered XV of said complaint.

XVI.

Said defendants deny all of the allegations contained in paragraph numbered XVI of said complaint, except those relating to the force and character of the decisions referred to therein.

XVII.

Said defendants deny all of the allegations contained in paragraph numbered XVII of said complaint.

XVIII.

Said defendants deny all of the allegations contained in paragraph numbered XVIII of said complaint, and allege that this Honorable Court, sitting in equity, has not jurisdiction to hear or determine upon the matters and things set out and alleged in said complaint.

XIX.

Said defendants deny each and every other allegation contained in said complaint not herein specified admitted.



## XX.

For further answer to the said bill of complaint said defendants allege:

(a) That the said defendant William Fisher, Supervising [25] Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, before the expiration of 30 days after the said defendants Donald Ames and Harry C. Lord, Local Inspectors, Steamboat Inspection Service, Department of Commerce of the United States, acting as a local board of steamboat inspectors, had made and entered their findings and decision exonerating the said plaintiff from all blame or responsibility for the cause of the collision between the steamship "West Hartland" and the steamship "Governor," as alleged in paragraph numbered VII of said complaint, upon his own motion reviewed the said decision and action of the said local board of Steamboat Inspectors, and upon such review, and prior to May 14, 1921, upon good and sufficient evidence concluded that the said plaintiff was in part to blame for said collision, and thereafter, and, to wit, on May 16, 1921, and in order to afford the said plaintiff an opportunity to be heard in the matter before the taking of final action by the said William Fisher in the matter of revoking, changing or modifying the said decision and action of the said Board of Local Inspectors, made a charge in writing against the said plaintiff, which said charge contained a notification to the said plaintiff to appear before him, the said William Fisher, to

make answer to said charge, and that on said May 16, 1921, said William Fisher caused a copy of said written charge and notice to be duly mailed at the United States Postoffice in the city of Seattle, State of Washington, addressed to the said plaintiff at his true address in the said city of Seattle. That Plaintiff's Exhibit "A" attached to the complaint herein is a true copy of said charge and notice. That pursuant to said notice the said plaintiff appeared before the said William [26] Fisher, and a hearing was had upon said charge as hereinbefore more particularly alleged. That the action of the said defendant William Fisher, in reviewing the decision and action of the said local Board of Inspectors, was done by the authority of and under and pursuant to the provisions of an act of Congress approved June 10, 1918, entitled "An Act to Provide for Appeals from Decisions of Boards of Local Inspectors of Vessels and for Other Purposes."

(b) That thereafter, and on July 22, 1921, the said defendant, William Fisher, made his written findings and conclusions and decision by which, among other things the license of the said plaintiff as master and pilot was suspended for a period of two years from July 22, 1921, and on said July 22, 1921, notified the said plaintiff of said findings, conclusions and decision. That said plaintiff's Exhibit "C" attached to said complaint is a true copy of said findings, conclusions and decision, and of said notification.

(c) That thereafter said plaintiff appealed from the said findings, conclusions and decision of the said defendant William Fisher to the Supervising Inspector General, Steamboat Inspection Service, Department of Commerce of the United States, and on August 23, 1921, the said Supervising Inspector General affirmed the findings, conclusions and decision of the said William Fisher, and dismissed the said appeal of said plaintiff. That the said action of the said Supervising Inspector General was thereafter and on August 24, 1921, duly approved by the Honorable C. H. Huston, Assistant Secretary of Commerce, duly acting for the Secretary of Commerce. That Plaintiff's Exhibit "D" attached to said complaint is a true copy of the said decision [27] of the Supervising Inspector General.

(d) That shortly prior to the passage of said Act of Congress entitled "An Act to Provide for Appeals From Decisions of Boards of Local Inspectors of Vessels and for Other Purposes," the committee on the Merchant Marine and Fisheries of the House of Representatives of the United States, to whom the bill for such act had been referred, submitted a report on said bill to said House of Representatives. That a copy of said report is hereto attached, and made a part hereof and marked Exhibit "A."

WHEREFORE the said defendants pray that said bill of complaint be dismissed with costs, and

for such other relief in the premises as to the Court may seem meet and proper.

WILLIAM FISHER.

WILLIAM FISHER,

Supervising Inspector for the Eleventh District,  
Steamboat Inspection Service, Department of  
Commerce of the United States,

DONALD AMES,

HARRY C. LORD,

Donald Ames and Harry C. Lord, Local Inspectors,  
Steamboat Inspection Service, Department of  
Commerce of the United States,

Defendants Above Named.

FREDERICK MILVERTON,

Attorney for Said Defendants. [28]

State of Washington,

County of King,—ss.

William Fisher, being first duly sworn on oath,  
deposes and says:

That he is one of the defendants in the above-entitled cause; that he has read the foregoing answer of the defendants in said cause, and knows the contents thereof, and that the same is true of his own knowledge.

WILLIAM FISHER.

Subscribed and sworn to before me this 26th day  
of September, 1921.

[Notarial Seal]      HARRIET L. SCOTT,

Notary Public in and for the State of Washing-  
ton, Residing at Seattle. [29]



**Exhibit "A."****HOUSE OF REPRESENTATIVES.**

64th CONGRESS

**REPORT**

1st Session.

No. 495

**APPEALS FROM DECISIONS OF BOARDS OF  
LOCAL INSPECTORS OF VESSELS.**

April 5, 1916.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. SAUNDERS, from the Committee on the Merchant Marine and Fisheries, submitted the following

**REPORT.**

(To accompany H. R. 13223.)

The Committee on the Merchant Marine and Fisheries, to whom was submitted the following bill:

A BILL to provide for appeals from decisions of boards of local inspectors of vessels, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whenever any person directly interested in or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any decision or action of a supervising inspector of the Supervising Inspector General, whose deci-



sion, when approved by the Secretary of Commerce, shall be final; Provided, however, That application for such re-examination of the case by a supervising inspector or by the Supervising Inspector General shall be made within thirty days after the decision, or action, appealed from shall have been rendered or taken; And provided further, that in all cases reviewed under the provisions of this act where the issue is the suspension or revocation of the license of a licensed officer such officer shall be allowed to be represented by counsel and to testify in his own behalf.

Sec. 2. That whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision they shall report the case to the supervising inspector of the district, who shall investigate and decide the same; and any supervising inspector may within thirty days thereafter, upon his own motion, review any decision or action of any board of local inspectors within his district; and in like manner the Supervising Inspector General may within thirty days thereafter review any decision or action of any supervising inspector or board of local inspectors and the decision of the Supervising Inspector General in such case shall, when approved by the Secretary of Commerce, be final.

Sec. 3. That any decision of action reviewed by the Supervising Inspector General, or by any supervising inspector, as provided in sections one and two of this act, may be revoked, changed, or modified by such reviewing officer, who shall have

power to administer oaths, and to summon and compel the attendance of witnesses by a similar [30] process as in the district courts of the United States; and the disbursing clerk, Department of Commerce, shall pay, on properly certified vouchers, such fees to any witness so summoned, for his actual travel and attendance, as shall be officially certified to by the officer reviewing the case, not exceeding the rate allowed for fees to witnesses for travel and attendance in the district courts of the United States.

Sec. 4. That the Secretary of Commerce shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this act;

Sec. 5. That section forty-four hundred and fifty-two of the Revised Statutes, as amended by section six of the act of March third, nineteen hundred and five, is hereby repealed—  
respectfully reports the same back to the House without amendment, with the recommendation that it do pass.

The reasons for the enactment of this measure may be found in certain facts ascertained in the investigation of the Eastland Disaster at Chicago in July, 1915.

It developed in the course of that investigation that the action of the local inspectors was final, under existing law, with relation to various situations vitally affecting the public interest. In connection with this investigation the Secretary of Commerce secured the aid of several prominent

men in Chicago who acted as an advisory committee. At the conclusion of the hearing these gentlemen made a number of recommendations. One of these recommendations was to the effect that in all cases where the power of decision of the local inspectors was final under existing law, an appeal shall be provided for all the parties directly concerned. The primary purpose of this bill is to afford this appeal, the course of the same being from the local inspectors to the supervising inspector and from the supervising inspector to the supervising inspector general. The provisions of this bill would allow an appeal to an officer convicted by the local inspectors of dereliction of duty, and in case of acquittal a like appeal is provided for the department.

Again, the local board of inspectors might make an entry in a certificate of inspection allowing the use of a less number of officers than the considerations of safe navigation for the vessel inspected would suggest as necessary and proper. Under these circumstances the owners of the vessel from motives of selfish personal interest might not take an appeal, but would be willing to abide by the action of the inspectors. This bill provides in such a case not only for a review on his motion by the supervising inspector of any action of the local inspectors, but affords in addition an appeal from the decisions of the local board, to any person directly interested in, or affected by its decision. The reasons for the passage of this measure are both obvious and impelling. Appended will be

found the letter of the Secretary of Commerce to the chairman of this committee, with the accompanying documents. [31]

DEPARTMENT OF COMMERCE.

Office of the Secretary.

Washington, December 21, 1915.

My Dear Judge Alexander: I shall be glad if you will attach this letter to that which I have heretofore written you respecting H. R. 4783.

The inclosed is one of the regular accident reports made to me by the Steamboat-Inspection Service. Attached to it is a copy of the letter I have sent to the service in the matter. The penalty of 30 days' suspension of license for such violation of regulations as has resulted in this case in the sinking of the steamer and the loss of two lives is absurdly inadequate. Nothing can be done about it, however, by the department. There is no appeal. I can write the letter of which copy is herein, but if the inspectors see fit they can do the same thing again. The suspension should have been for at least six months. It is wholly wrong that the Government should find its hands tied in matters of this kind, and it is subversive of the discipline which the service exists to preserve.

Yours very truly,

WILLIAM C. REDFIELD,

Secretary.



Hon. J. W. ALEXANDER,  
House of Representatives,  
Washington, D. C.

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

Washington, December 8, 1915.

THE SECRETARY OF COMMERCE:

Pursuant to instructions, you will please find below report of accident in which a vessel subject to the inspection of this service was concerned.

Names of Vessels: Towing Steamers LACKAWANA and TRITON.

Line or owner: Delaware, Lackawanna & Western Railroad Co. New York, N. Y., and the Independent Pier Co. Philadelphia, Pa. owners, respectively.

Officers in Charge of vessels: M. Brophy and Thomas O. Moon, masters, respectively.

Local district in which accident occurred: Boston.

Place of accident: Handkerchief Light Vessel.

Date of Accident: August 15, 1915.

Nature and extent of Accident: Collision, causing the towing Steamer LACKAWANNA to sink.

Cause of Accident: Violation of regulations governing tows of seagoing barges on inland waters.

Number of lives lost: Two.

Vessels were last inspected at Hoboken, N. J., and Philadelphia, Pa., respectively, on September 17, 1915, and May 18, 1915, respectively, by C. Smith and H. McPherson, assistant inspectors



of hulls, and W. G. Fenwick and C. A. Mattson, assistant inspectors of boilers.

Action taken: Case investigated and the licenses of the masters of both these vessels were suspended for a period of 30 days. [32]

REMARKS.—The barge NANTICOKE in tow of the tug TRITON collided with the tugboat LACKAWANNA, causing the latter to sink soon after. The mate and the cook of the LACKAWANNA were drowned, and the remainder of the crew of the LACKAWANNA, 14 men, were rescued in their lifeboat.

This case was investigated by the local inspectors at Boston and charges were preferred against the masters of these vessels. M. Brophy, master of the LACKAWANNA, was tried and found guilty of violation governing tows of sea-going barges on inland waters and his license was suspended for thirty days. Thomas O. Moon, master of the tug TRITON, failed to appear at his trial on the dates he was directed to do, and upon his failure to appear the board convened for trial and entered a finding of guilty by default and his license was suspended for 30 days, said suspension to begin on the date of the receipt of his license by the local inspectors.

The matter of the short period of the suspension of these men's licenses was taken up by this office with the local inspectors. The local inspectors advised that in arriving at the term of suspension they did not consider any extenuating circum-

stances, although certain conditions existed that might be considered extenuating.

GEO. UHLER.

December 21, 1915.

SUPERVISING INSPECTOR GENERAL,  
STEAMBOAT-INSPECTION SERVICE:

I am sending to the chairman of the House of Representatives Committee on Merchant Marine and Fisheries accident report 71663 of December 8, respecting the loss of the towing steamer LACK-AWANNA and with it goes a copy of this letter. I am using this example to urge the enactment of H. R. 4783, which would give the department the right of appeal from such absurd decisions as that in the present case.

Here is a case which it is admitted that the captain of a towing steamer so acted that a collision ensued causing the loss of towing steamer LACK-AWANNA with two lives. The penalty is a suspension of license for 30 days. It is hard for me to conceive the condition of mind in which so trifling a penalty is imposed for so serious an offense. The regulations intended to save life and property were broken and loss of life and property both ensued. What worse offense is there that a marine captain could commit than this? It is not the absence of skill that is charged. It is not in the strictest sense an accident that is charged. It is a violation of regulations causing the death of human beings and the loss of a steamer. I should expect to see in a case of this kind an indefinite suspension of license, or cer-

tainly one for a period of not less than six months. I deeply regret that the law seems such that charges cannot be brought against the local inspectors who impose this trivial penalty for neglect of duty. [33]

I wish you to impress upon them that I regard them as having been derelict and as deserving of a severe reprimand. I trust in future cases they may show a higher sense of the value of human life and of the purpose for which they sit in judgment on violators who by such violations cause loss of life and property.

WILLIAM C. REDFIELD,  
Secretary.

[Endorsed]: Filed in the United States District Court for the Western District of Washington, Northern Division. Sep. 27, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

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In the District Court of the United States for the  
Western District of Washington, Northern Division.

No. 276-E—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the  
Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the

United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants. 1d

**Order Allowing Amendment of Plaintiff's Com-  
plaint.**

This cause coming on regularly to be heard upon the application of plaintiff for leave to amend his complaint, the said plaintiff appearing in court by his attorney, Howard C. Cosgrove, and the defendants appearing in court by their attorney, Frederick Milverton, and no objection being voiced by said defendants or their said counsel:

It is **THEREFORE CONSIDERED** and **ORDERED** by the Court that the said plaintiff may be and he is hereby granted leave to amend his said complaint.

Done in open court this 27th day of September, 1921.

**JEREMIAH NETERER,**

**Judge.**

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 27, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

f ,                      No. 276-E—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the  
Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the  
United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

### **Amended Complaint.**

Leave of Court having been first obtained, plain-  
tiff does hereby present this his amended complaint  
and for cause of action against said defendants  
states and alleges:

#### **I.**

That the said defendant William Fisher was, on  
the 1st day of April, 1921, ever since has been and  
now is a resident and citizen of the City of Seattle,  
State of Washington, and the duly appointed, quali-  
fied and acting Supervising Inspector for the  
Eleventh District, Steamboat Inspection Service,  
Department of Commerce of the United States with  
headquarters at Seattle, Washington.



## II.

That the said defendants Donald Ames and Harry C. Lord were on the 1st day of April, 1921, ever since have been, and now are residents and citizens of the city of Seattle, State of Washington, and respectively United States Inspector of Hulls and United States Inspector of Boilers, Steamboat Inspection Service, Department of Commerce of the United States, together making the Local Board of Steamboat Inspectors for said Steamboat Inspection Service, Department of Commerce of the United States and with headquarters at Seattle, Washington. [36]

## III.

That the said plaintiff is a resident and citizen of the city of Seattle, State of Washington.

## IV.

That the said plaintiff is by occupation a master mariner and has devoted his lifetime to that avocation and by reason thereof has become and is specially fitted to serve as a master mariner. That by reason of having devoted all of his time to this particular occupation he has been unable to educate himself or gain any experience in any other occupation; that unless he is enabled to follow and pursue his said calling as a master mariner he will be unable to support himself and those dependent upon him; that since October, 1898, with the exception of three months, he has held from the United States an unlimited ocean license as master of steam vessels; that on the 31st day of March, 1921, he held and ever since has held and

does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and adjacent inland waters, Honolulu Harbor, Columbia Bar from Astoria, San Francisco Bay from Benicia and San Francisco, each to sea, also San Pedro Harbor to sea, said license being numbered 73609, issue No. 5, 5, the same having been issued for the period of five years from December 2, 1918.

V.

That the value of said license to the said plaintiff is more than the sum of Three Thousand Dollars (\$3,000.00).

VI.

That on and during the 1st day of April, 1921, the said plaintiff was the duly appointed and acting master of the United States steamboat "West Hartland"; that on said date said vessel collided with the steamboat "Governor" in the vicinity of Point Wilson, Washington, in the Waters of Puget Sound. [37]

VII.

That the said defendants Donald Ames and Harry C. Lord, as said Local Board of Steamboat Inspectors, immediately upon said collision taking place directed a hearing to be had before said Board as to the causes and responsibility for said collision; many witnesses were summoned by said Board and after being duly sworn, testified concerning said collision and among them was the said plaintiff. After taking all of said evidence and having duly considered the matter, the said Board

on the 16th day of April, 1921, made and entered their findings and decision fully and completely exonerating the said plaintiff from all blame or responsibility for the cause of said collision, said findings and decision being in writing, a copy of which is hereto attached, marked Plaintiff's Exhibit "A" and made a part hereof.

#### VIII.

That neither the said plaintiff nor any party lawfully interested in said findings and decision appealed therefrom to the said Supervising Inspector; nor has said Supervising Inspector filed any charges with the said Local Board against the said plaintiff nor has he requested or directed the said local Board to explain or correct their said findings and decisions; and the time has long since expired within which any such appeal could have been taken.

#### IX.

That the said defendant William Fisher did not prior to May 17, 1921, give to the said plaintiff any notice or information that the said defendant William Fisher, as such Supervising Inspector, contemplated a review of said findings and decision of said local Board; that prior to May 17, 1921, the said plaintiff did not receive any notice or information from anyone to the effect that the said defendant William Fisher intended to [38] review said findings and decision of said local Board; that on the 17th day of May, 1921, said plaintiff received from the said William Fisher, as such Supervising Inspector, a letter a copy of which

is attached hereto, marked Plaintiff's Exhibit "B" and made a part hereof.

#### X.

That the said plaintiff protested to the said defendant William Fisher, as such Supervising Inspector, against his right to make such charges or to hold such hearing in the manner and form and in the time made or at all or in anywise and particularly reserving any and all rights which he might have in the premises, appeared before said Supervising Inspector, who proceeded to hold a hearing.

#### XI.

That on the 23d day of July, 1921, the said plaintiff received from the said defendant William Fisher, as such Supervising Inspector, certain documents purporting to be his findings relative to said collision as affecting the said plaintiff and purporting also to be the said Supervising Inspector's decision and order purporting to suspend for a period of two years from July 22, 1921, plaintiff's said license and further ordering the said plaintiff to deposit his said license in the office of the United States Local Inspectors at Seattle, during the period of its suspension. A copy of said findings, said decision, and the accompanying letter of the said Supervising Inspector are hereto attached, marked Plaintiff's Exhibit "C," and made a part hereof.

#### XII.

That the said plaintiff, protesting against the claimed right of the said defendant William Fisher,



as such Supervising Inspector, to make such charges, or any charges, or to hold such hearing in the manner and form made and held, or in any manner [39] or form in the premises, or to make such findings or order, or any findings or order at all in the premises, and without waiving any of his rights in the premises, appealed to the Supervising Inspector General of the United States Steamboat Inspection Service. That on or about the 30th day of August, 1921, the said plaintiff received from F. C. Reagan, who as his attorney had prepared and presented his appeal to said Supervising Inspector General, a letter received by the said Reagan from the said Supervising Inspector General, a copy of which letter is hereto attached, marked Plaintiff's Exhibit "D," and made a part hereof.

### XIII.

That the said findings and decision of the Supervising Inspector and the said decision as set forth in the letter of the said Supervising Inspector General to the said Reagan have by some unknown person been *give* publicity through the newspapers, although neither of said decisions or orders have been filed with said local Board of Steamboat Inspectors.

### XIV.

That said plaintiff has since the 23d day of July, 1921, diligently sought to obtain employment and particularly employment as master and/or pilot under such license, but on account of and by reason of the said wrongful, unauthorized and illegal



findings, decision and order of said Supervising Inspector and the wrongful, unauthorized and illegal decision and order of said Supervising Inspector General and the publicity given thereto and thereof has been unable to secure such particular employment, or any employment at all, other than that as temporary watchman of a laid-up vessel; that until the relief requested herein is granted said plaintiff will be unable to serve as master and /or pilot of any vessel or to secure any employment bringing in sufficient remuneration to support himself and his dependents. [40]

XV.

That the said defendant William Fisher, as said Supervising Inspector, threatens to enforce his said order suspending the said license of the said plaintiff.

XVI.

That the said defendant William Fisher, as such Supervising Inspector, never reviewed the said findings and decision of said local Board in the time and manner provided by law, nor did he ever review or consider said findings and decision of said local board except as herein stated.

XVII.

That since March 31, 1921, neither the said defendant William Fisher, as said Supervising Inspector, nor the said Supervising Inspector General ever acquired jurisdiction over the said plaintiff or his said license or his right to use and enjoy the same on account of or by reason of the conduct or actions of said plaintiff as master of said

“West Hartland” immediately preceding, at, and immediately after the said collision, or on account or by reason of said findings and decisions of said local Board, or at all.

### XVIII.

That all of the proceedings, hearings and orders of the said defendant Fisher, as said Supervising Inspector, and the said Supervising Inspector, and the said Supervising Inspector General, which have been made or which may be made affecting or pretending to affect the right of the said plaintiff to serve as master under said license by reason or on account of the conduct or actions of the said plaintiff as master of said “West Hartland” immediately preceding, at, and immediately after the said collision are without authority in law and null and void, but nevertheless of such force and character as to effectually deprive the said plaintiff of an opportunity to serve as master and/or pilot under said license, in that no one will give him any such employment and he is thereby [41] irretrievably damaged.

### XIX.

That by reason of said wrongful, unlawful and illegal proceedings, hearings, findings, decisions and orders, and each of them, of the said defendant William Fisher, as said Supervising Inspector, and the said Supervising Inspector General and each of them, said plaintiff has been deprived of a valuable property right, to wit, the right to serve as master and/or pilot under his said license, all without due process of law.

## XX.

That plaintiff has no plain, speedy, and adequate remedy at law in the premises.

NOW, THEREFORE, said plaintiff prays:

1. That the said defendant William Fisher, as Supervising Inspector, be perpetually enjoined from filing with said local board his findings, decision and order, or either or any of them, or any decisions or order, or any findings, decision, or order in anywise reversing, changing or modifying the said findings and decision of the said local board as to the said plaintiff or his license, or from doing anything tending to reverse, modify or change said decisions and order of said local Board as to the said plaintiff or his said license.

2. That said defendant William Fisher, as such Supervising Inspector, be perpetually enjoined from doing anything toward enforcing his said decisions and order.

3. That the said defendant William Fisher, as such Supervising Inspector, be perpetually enjoined from any interference with plaintiff's services or right to serve as master and or/pilot under his said license on account of or by reason of plaintiff's conduct just before, at, or immediately following said collision. [42]

4. That said defendants Donald Ames and Harry C. Lord, as such local Board, be perpetually enjoined from placing on file with the records of said local Board, or from complying with, recognizing or receiving any findings, decision or order of the said defendant William Fisher, as Super-

vising Inspector, or from the said Supervising Inspector General, or anyone else, tending to modify, change or reverse their said decision as such local Board as to the said plaintiff; and that they, as such Board, and each of them, be perpetually enjoined from cancelling or suspending the said license of the said plaintiff for or on account of his actions or conduct immediately preceding, at, or immediately following said collision.

5. That said pretended findings, decision and order of the said defendant William Fisher, as Supervising Inspector, and the said pretended decision and order of the said Supervising Inspector General be declared null and void.

6. That if prior to the final order of the court herein the said defendant William Fisher, as such Supervising Inspector, or the said Supervising Inspector General shall file with said local Board any findings, decision or order in anywise reversing, changing or modifying the said decision of the said local Board, or tending in anywise to suspend or cancel the said license of the said plaintiff or direct any interference therewith or the use thereof by said plaintiff, or service by said plaintiff thereunder on account of or by reason of the actions or conduct of the said plaintiff immediately prior to, at, and immediately following said collision the said defendants Donald Ames and Harry C. Lord be ordered to file with the clerk of this court each and every of such findings, decisions and order making a report in writing thereof to said Court and deliver to record counsel of plaintiff herein



a copy of such [43] report, together with a copy of such findings, decisions, or orders, and that said findings, decisions and orders and each of them be declared null and void and that the clerk of said court be directed to so stamp each of such findings, decisions and orders.

7. That said injunction be directed not only to said defendants named, but also to their successors in office.

8. That he may have such other and general relief as may seem meet and agreeable to the court.

JOHN ALWEN,  
Plaintiff.

HOWARD G. COSGROVE,  
Attorney for Plaintiff.

State of Washington,  
County of King,—ss.

John Alwen, being first duly sworn, on oath deposes and says: That he has read the foregoing complaint in equity, understands and knows the contents thereof, and that the same is true.

JOHN ALWEN.

Subscribed and sworn to before me this 28th day of September, 1921.

[Seal]                      HOWARD G. COSGROVE,  
Notary Public Residing at Seattle, Washington.

Service of the foregoing amended complaint by receipt of copy thereof is hereby admitted this September 28, 1921.

FREDERICK MILVERTON,  
Special Assistant U. S. Atty. in Admiralty,  
Attorney for Defendants. [44]



**Plaintiff's Exhibit "A."**

File No. 3559.

Office of Local Inspectors,  
Seattle, Washington,  
April 16, 1921.

IN THE MATTER OF THE INVESTIGATION  
OF THE COLLISION BETWEEN THE S. S.  
"GOVERNOR" AND "WEST HARTLAND"  
ON APRIL 1, 1921, OFF POINT WILSON,  
RESULTING IN THE SINKING AND TO-  
TAL LOSS OF THE S. S. "GOVERNOR."

**FINDINGS.**

We hold that Harry H. Marden, while in charge of the S. S. "Governor" March 31st, and April 1st, 1921, under authority of a license as Master of Pacific Ocean, coastwise steamers, also Pilot on waters of Puget Sound and Adjacent inland waters; Serial No. 67609, Issue No. 4, 14, issued at Seattle, Washington, October 5, 1917, violated Title 52, Section 4442, U. S. Revised Statutes, specifically—"Inattention to the duties of his station" in not leaving the pilot house, the windows of which were closed, in response to the report of the lookout and bridge quartermaster that certain lights were in close proximity, which violation resulted in the collision between the S. S. "Governor" and S. S. "West Hartland." We hold that Ernest Kellenberger, Second Mate on the S. S. "Governor" holding a license as Chief Mate of steam vessels, any ocean; and who was on watch with the pilot at the time of the collision, violated Title 52, Section 4442, U. S.

Revised Statutes, specifically—"Inattention to the duties of his station," in not keeping a proper lookout after relieving the third mate to take the 12:00 to 4:00 watch A. M. April 1, 1921, when the steamer lights were in plain view and had been previously reported, and which inattention resulted in disaster to his vessel. He was at this time in official charge of the S. S. "Governor." We also hold that Arne Hage, Third Mate in official charge of the S. S. "Governor," before 12:00 o'clock, and who was on watch with the pilot at that time, violated Title 52, Section 4442, U. S. R. S., specifically,—“inattention to the duties of his station” in not leaving the pilot house, the windows of which were closed, in response to the report of the lookout and bridge quartermaster that certain lights were in close proximity, which violation resulted in the collision between the S. S. "Governor" and the "West Hartland."

The "West Hartland," having discharged her pilot off Port Townsend, had set a course to pass Point Wilson that would cross obliquely the course of any vessel passing Point Wilson on a course laid within  $3/8$  or so of a mile off Marrowstone Point. When the master of the "West Hartland," Capt. John Alwen, who had personal charge of the navigation of the vessel, at the time, first saw the approaching lights of the "Governor" he realized that the vessels were developing a crossing situation. He watched the approaching lights anxiously but abided by the provisions of the crossing rule. Crossing-Rule VII. When two steamers are meet-

ing at right angles or obliquely, viz.: the vessel having another on her own starboard side must give way to the other, the latter to hold her own course and speed. This makes the latter vessel a "privileged" vessel under the law, as the vessel having the right of way must keep her course and speed, and the other vessel may assume that she will do so. This renders it obligatory on the vessel which has the right of way to pursue her course at the speed she had been [45] keeping up previously. She must rely on the other vessel to avoid collision, and not embarrass her by any maneuver. All she need do is do nothing. Then the other vessel knows what to expect and navigates accordingly. This rule applies to all the other steering and sailing rules. Under it, when a sail vessel is running free keeps out of the way, the closehauled vessel keeps her course. Between two crossing steamers, when the one on the left keeps out of the way, the other keeps her course. Between a steamer and a sail vessel when the steamer keeps out of the way, the sail vessel keeps her course. The principle is the same in all these different contingencies.

Sec. 155, U. S. 252, 15 Sup. Ct. 99, 3 L. Ed. 139. This rule the "West Hartland" was endeavoring to follow until the master saw that a collision was imminent when he reversed his engines to full speed astern in an effort to lessen the force of the impact that must follow, a privilege granted him under rule XI of the inland pilot rules, which read as follows: "In obeying and construing these rules due regard shall be had to all dangers of

navigation and collision and to any SPECIAL CIRCUMSTANCES which may render a departure from the above rules necessary in order to avoid immediate danger." The expression "if necessary" does not mean essential but prudent or expedient, to the mind of a mariner of skill. As Capt. John Alwen, master of the S. S. "West Hartland" acted in accordance with these principles, he is absolved from all blame.

Capt. Edward P. Bartlett, master of the S. S. "Governor" not being in charge of the navigation of that vessel up to the time of the collision between the vessels, is absolved from all blame. He had gone to his room after sighting Point Wilson ahead and assured himself that all was going well, before the vessel had reached that point. He took command immediately on hearing whistle signals between the vessels and by his intelligent supervision of the debarkation of the survivors everything worked smoothly under the trying circumstances incident to a disaster of this character.

(Sgd.) DONALD AMES,  
HARRY C. LORD,  
U. S. Local Inspectors. [46]

HCS.



**Plaintiff's Exhibit "B."**

**DEPARTMENT OF COMMERCE.**

Steamboat-Inspection Service.

In reply refer to

File No. 788/1.

Office of Supervising Inspector,

11th District,

Seattle, Wash.

May 16, 1921.

Captain John Alwen,

2023 Boylston Ave. North,

Seattle, Washington.

Sir:

You are hereby charged with violation of the U. S. Revised Statutes, sections 4439 and 4450, with negligence, unskillfulness and inattention to your duties as master of the steamship WEST HARTLAND on the night of March 31, 1921, and the morning of April 1, 1921, in this, that being in doubt as to the course and intention of the steamship GOVERNOR as that vessel and the WEST HARTLAND were approaching each other, you failed to signify your lack of understanding, which resulted in the collision between the WEST HARTLAND and the GOVERNOR; and further, in this, that having signalled the GOVERNOR of your intention to hold course and speed you failed to do so but without informing the GOVERNOR thereof you stopped and reversed engines, which resulted in the collision between the WEST HARTLAND



and the GOVERNOR; and further, in this, that when the collision was imminent you did not take proper measures to avoid the collision which resulted in the collision between the WEST HARTLAND and the GOVERNOR.

At your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire.

Respectfully,  
(Sgd.) WILLIAM FISHER,  
Supervising Inspector, Eleventh District. [47]

**Plaintiff's Exhibit "C."**

**DEPARTMENT OF COMMERCE.**

**Steamboat-Inspection Service.**

In reply refer to  
File No. 788/1.

Office of Supervising Inspector, 11th Dis.  
Seattle, Wash., July 22, 1921.

Captain John Alwen,  
2023 Boylston Ave. North,  
Seattle, Wash.

Sir:

Herewith please find copy of my findings, conclusions and decisions in the matter of your recent trial. A copy of my decision addressed to you is in the same mail.

Respectfully,  
(Sgd.) WILLIAM FISHER,  
Supervising Inspector, Eleventh District

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

In reply refer to  
File No. 788/1.

Office of Supervising Inspector.

11th District.

Seattle, Wash., July 22, 1921.

Captain John Alwen,

2023 Boylston Ave. North,

Seattle, Washington.

Sir:

I hold and it is my decision that you are guilty of negligence, unskillfulness, and inattention to your duties as Master of the S. S. "West Hartland" on the night of March 31, 1921, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. GOVERNOR.

Your license as Master and Pilot, No. 73609, issue number 5, 5, dated December 2, 1918, is hereby suspended for a period of two years from this date, July 22, 1921.

You are directed to deposit your license in the office of the U. S. Local Inspectors at Seattle for custody during the period of its suspension.

Respectfully,

(Sgd.) WILLIAM FISHER,

Supervising Inspector, Eleventh District. [48]

F/W.

## DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

In reply refer to  
File No. 788/1.

Office of Supervising Inspector,  
11th District, Seattle, Wash.

July 22, 1921.

IN THE MATTER OF THE TRIAL OF  
CHARGES PREFERRED BY THE U. S.  
SUPERVISING INSPECTOR, ELEVENTH  
DISTRICT, AGAINST CAPTAIN JOHN  
ALWEN, MASTER OF THE S. S. WEST  
HARTLAND, IN CONNECTION WITH  
THE COLLISION BETWEEN THAT VES-  
SEL AND THE S. S. GOVERNOR ON  
THE MORNING OF APRIL 1, 1921.

This proceeding arises out of a collision between the S. S. West Hartland and the S. S. Governor, which occurred shortly after midnight April 1, 1921, and as a result of which eight persons lost their lives, and the Governor, a passenger liner valued at \$2,250,000.00 was sunk.

The Board of Local Inspectors after an investigation rendered a decision April 16th, exonerating Captain Alwen of the West Hartland from all blame, a careful reading of the testimony taken at the investigation convinced me that the conclusion of the local Board in this regard was not warranted by the evidence then before them. Acting in accordance with my duty as Supervising Inspector (Act of June 10, 1918) and following the instructions of the Department as to the proper

procedure, I filed charges against the Master of the West Hartland.

The proceedings against the Pilot of the Governor are before me in another case, but are not involved here. For the purpose of this decision, it may be conceded that Captain Marden was culpable in his management of the Governor; this case is solely as to the participation of Captain Alwen; Was he free from blame or was he negligent, unskillful, or inattentive to his duties in respect to the matters set forth in the charges. To reach a correct solution of this question hypothetical questions based upon assumed positions of the ships, throw very little light.

After reviewing all the testimony given in the case, both before the Local Board and myself, and endeavoring to reconcile the frequent conflicts in the evidence, I find the facts to be as follows:

#### FINDINGS.

The West Hartland is a freighter of 6167 gross tons (8800 tons dead weight), 410 feet in length, equipped with 2500 horse power turbine engines. On the Night in question, March 31, 1921, she left Port Townsend, after putting ashore her pilot, at 11:50 P. M. She was deeply laden (24' 8" aft) and steering sluggishly. Starting at rest at a point more than  $\frac{3}{4}$  of a mile off shore, she was put on a course N. N. W., toward the open water of Admiralty Inlet and Puget Sound; at 11:59 she had attained a speed of about 5 knots; at 12:02, 6 knots, and would not have reached her full speed at  $8\frac{1}{2}$  knots until about 12:05.

Meanwhile at 11:54, the Master and the third officer observed the Governor approaching on a crossing course. She was brightly lighted and her identity, speed and destination were immediately [49] known to them as is evidenced by Captain Alwen's first comment, "Hello, there's the Governor."

The latter vessel with 305 persons on board was en route from Victoria to Seattle, traveling at a speed of about 15.4 knots per hour. The approach of the West Hartland was not observed by the Officers of the Governor because the red side light and range lights of the West Hartland were confused with a bright red light on the dock at Port Flagler, and a number of bright lights above and in the vicinity of the dock, the vessel and dock bearing about in line from the Governor.

A few moments after noting the appearance of the Governor, Captain Alwen remarked to the third officer, "It's about time for her to do something."

Again shortly after midnight he said to the second officer, "What is he trying to do."

To which the latter responded, "He is probably trying to cross us."

At about this same time, the Quartermaster on watch overheard the Captain say to himself, "I wonder what that fellow is going to do."

All this time the vessels were rapidly approaching each other without any signals being exchanged. Any signal from the West Hartland during



these five or six crucial minutes would have saved the situation, but no signal was given.

Not until a time which the weight of the evidence fixes at within a minute and a half of the collision did Captain Alwen sound his whistle.

The collision occurred at 12:04 or 12:04½ A. M. With the exception of the bridge log of the *West Hartland*, in which the entries were made after the accident, and were disputed by Captain Alwen, the testimony of the witnesses as to the time elapsing between the first whistle and the collision may be summarized as follows: Captain Alwen's single blast was immediately answered by three blasts from the Governor; the telegraph signal to the engine room was given between the single blast and the answer. The second officer of the *West Hartland* testified that he operated the telegraph before he heard the three whistles from the Governor and that the one whistle, operating the telegraph, and the three whistles occurred as close together as possible. The chief engineer of the *West Hartland* heard the telegraph before he heard the three whistles, and the third mate of the *West Hartland*, who was standing in the chart room three feet from the door upon hearing one whistle followed immediately by three whistles, opened the door as quickly as he could and was just entering the door when he heard the telegraph ring. Only one signal was received in the engine room before the collision "Full speed astern," and the original record made of this by the water tender fixes the receipt of this signal at one minute be-

fore the collision. Passengers on the Governor heard the single blast answer at once by three blasts and the crash followed almost at once, within a fraction of a minute.

That the vessels were very close together at 12:03 can be proven in another way. The Governor's course prior to the collision was S.68 degrees E. and her average speed was 15.4 knots or a knot in 3:9 minutes. The West Hartland was making not less than 6 knots, a knot in 10 minutes. The vessels were approaching the convergence of their course lines at a combined speed of 2168, or more than a [50] third of a nautical mile a minute. Captain Alwen is positive that the vessels were three quarters of a mile apart at 12:01 or 4560 feet. In that situation, the vessels would reach the intersection of their course lines about 12:03. Mr. Colby puts the distance apart at 12.01 as about six lengths or 2466 feet and in that situation they would reach the point of collision before 12:03. Mr. Ahrens puts the distance apart at 12.03 as  $2\frac{1}{2}$  or 3 lengths, or 1000 to 1200 feet; distance apart at 12.03 as  $2\frac{1}{2}$  or 3 lengths, or 1000 to 1200 feet. Mr. Lane realized that the vessels were getting close just prior to the collision but thought the Governor had plenty of time to get by. He testified he was no judge of distance and had no idea how far apart they were. Captain Marden places the distance apart at 12.03 as one quarter of a mile or 1520 feet. Mr. Kellenberger puts the distance at less than a quarter of a mile. "So close it was instinctively realized that she was going to

hit, so close we all stood there holding our breath knowing she was going to hit, no possible chance to get out of it." Mr. Hage walked along the dock a distance of about 50 feet between the one whistle and the collision.

### CONCLUSIONS.

"(1) From the testimony I cannot escape the following conclusions: As the vessels approached each other, the Master of the West Hartland was in doubt as to the course and intention of the Governor. It is my opinion that when Captain Alwen declared, 'It is time for the Governor to do something,' it was then time for him to find out what the Governor was going to do and until he had that information he was in doubt as to the intention of the Governor. His doubt was shown very plainly by his question to the second officer, 'What is he trying to do,' and his doubt was expressed when he said, 'I wonder what that fellow is going to do.' It was especially necessary for him to know the intention of the Governor because the constantly accelerating speed of the West Hartland made it impossible for either vessel to determine whether there was risk of collision. Knowing that it was time for the Governor to do something and being in doubt about what that action would be, he continued on a crossing course without any indication from the Governor, and about seven minutes within the vessels collided sinking the Governor

with a loss of eight lives and a property loss of over \$2,500,000.

Captain Alwen's claim that bearings taken of the Governor indicated that she was crossing safely is not borne out by his question to the second officer, 'What is she trying to do,' and his talking to himself in the pilot house saying, 'I wonder what that fellow is going to do.' Both remarks were made after the time he claims to have taken the bearings. His first assumption may have been that she would cross in front of him; the fact remains that his first and only signal was to the effect that he would cross the Governor. Bearings taken before midnight would be of no value in determining the risk of collision later, because the speed of the West Hartland was accelerating very fast as she approached her maximum [51] momentum. The opening of the range lights of the Governor can be accounted for by the convergence of the course lines of the two vessels.

(2) Being in doubt as to the course and intention of the Governor, Captain Alwen failed to signify the fact by any signal until a catastrophe was imminent. The law and ordinary prudence impose on any vessel in doubt the duty of ascertaining the intention of the other vessel. The safety of vessels and the lives on board depend upon no chances being taken by either vessel and, when the failure of one vessel is apparent, or should be



apparent, or where there is doubt from any cause, this doubt should be indicated in ample time for exchange of signals to permit each vessel to safely maneuver. When Captain Alwen observed the green light of the Governor bearing on his port bow in such a manner as to make it apparent that the Governor was crossing the bow of the West Hartland and was persisting in this course, and giving no indication of any intention to change her course, her action causing Captain Alwen to ask the second officer, 'What is she trying to do,' and to remark, 'I wonder what that fellow is going to do,' there was apparent danger of collision. The very fact that a crossing such as the Governor was about to make is a violation of the law, it seems to me should have aroused doubt in any prudent and skillful navigator and cause him to blow timely danger signals.

(3) Having delayed giving a signal until too late, Captain Alwen blew one blast signifying that he would hold his course and speed and then immediately put his engines full speed astern. In other words, having claimed his right of way and immediately receiving a signal from the Governor that she was backing full speed, Captain Alwen, instead of keeping his signified course and speed, also backed up and thus kept the two vessels in the same relative situation. As justification for his action, Captain Alwen and his



counsel cite the rule applicable '*in extremis*,' which permits disregard of rules when collision is imminent. He is, however, in this dilemma; As heretofore noted, his whistle and signal to the engine room were almost simultaneous. If the ships were then '*in extremis*' there remained no opportunity to maneuver after the first whistle was blown and Captain Alwen stands self convicted of unwarranted delay in sounding some signal. Contrary to this is the testimony of Captain Alwen that he was backing for nearly two minutes before the collision, had taken about a knot off his speed and had time to signal the Governor of his changed intention. If this be true, then Captain Alwen went contrary to his expressed intention, failed to signify a change and thereby contributed to the disaster.

(4) The privileged ship is not free to proceed into a dangerous situation or act in disregard of the maxim 'Safety first.'

The decision of the Local Board puts, it seems to me, too broad an application on the well-known rule that the ship having the right of way shall hold her course and speed. [52] Even should it be conceded that a ship whose speed is constantly accelerating comes within the rule, though the nature of her maneuver is unknown to the burdened ship, yet it cannot be said that 'all she (the privileged ship) need do is do nothing.' Such a rule would encourage disregard of the sacred obligation

to preserve human life, and would, if literally pursued, result in an attitude on the part of those inclined to recklessness which would constitute a menace to safe navigation. While this proceeding is not in any sense a law suit,—on the contrary it pertains solely to a license issued by this department—yet it is proper to note that the highest legal authority has frequently recognized that the privileged ship as well as the burdened, is bound to use all possible skill and prudence to avoid putting human life in danger; and when danger looms ahead the officer in charge must exert caution and skill in the discharge of his important duties.

In this case every consideration demanded that an understanding be had as to the Governor's *intention before the point of danger was reached*. From a background of high land with many bright lights and deep shadows, Captain Alwen was putting out with his deep laden 8800 ton turbine ship; she was down by the head 1' 3"; she steered sluggishly; the Governor appeared and took a course that put him in doubt; a situation of danger was developing. Would she cross in front or behind him? The mere sounding of his whistle would determine it, yet he kept on until a position was reached when the immediate answering of his own whistle put him '*in extremis*.' The opportunity for prudence was then passed; he indicated that he would hold his course

and speed; the Governor reversed to comply if possible with his signal, and then he reversed and the two ships came together.

### DECISION.

I therefore hold and it is my decision that Captain John Alwen is guilty of negligence, unskillfulness, and inattention to his duties as Master of the S. S. West Hartland on the night of March 31, 1921, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. Governor, and his license as master and pilot, No. 73609, issue number 5, 5, dated December 2, 1918, is hereby suspended for a period of two years from this date July 22, 1921. Captain Alwen is directed to deposit his license with the U. S. Local Inspectors at Seattle, where it will remain during the period of its suspension.

(Sgd.) WILLIAM FISHER,  
Supervising Inspector Eleventh District." [53]

**Plaintiff's Exhibit "D."**

Copy

AEK.

In reply refer to  
File 81438.

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

Washington.

August 23, 1921.

Chief Clerk.

1921 Aug 24 AM 9/41

F. C. Reagan, Esquire,  
Office of United States Attorney,  
Department of Justice,  
Seattle, Washington.

Sir:

1. The Bureau is in receipt of your letter of the 15th instant, enclosing notice of appeal by Captain John Alwen, Master of the S. S. West Hartland, from the decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service at Seattle, Washington, in the matter of the collision between the S. S. Governor and the S. S. West Hartland on April 1, 1921, made and rendered July 22, 1921.

2. It is observed that the notice of appeal is signed by John Alwen, Master S. S. West Hartland, and countersigned by yourself as Attorney for Captain John Alwen, Master of S. S. West Hartland.

3. Receipt is also acknowledged of the brief of Captain John Alwen, signed by you as his attorney,

submitted in connection with his appeal from the decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service, Seattle, Washington, made and rendered July 22, 1921.

4. In reply, you are advised that your brief has been very carefully read, thoroughly analyzed, and comprehensively digested. All the evidence adduced at the trial has been considered in all its phases and from every direction, and as to its purpose and effect.

5. In the opinion of the Bureau, your contention that the action of the Supervising Inspector was irregular and not authorized by the law, has no force, as that authority is fully covered by Sections 2 and 3 of the Act of Congress, approved June 10, 1918, and the Supervising Inspector proceeded correctly in his consideration of this case. The method of obtaining evidence in cases of this character, its admission, application and purpose, is not governed by any rules of practice or procedure, and evidence may be secured in any manner that will best tend to elicit the information necessary or desirable in arriving at an intelligent and consistent conclusion and decision. The inuendo contained in your brief directed against the integrity and the impartiality of the Supervising Inspector deserves no consideration at my hand, and will be passed over without comment, as I believe that he has been eminently fair and impartial in his consideration of this important case, and that there has been no desire on his part to determine any other than a just and consistent conclusion.



6. The previous experience of the Supervising Inspector eminently fits him to determine responsibility for accident or casualty, and his judgment and discretion in such matters should have the most considerable attention. It is quite unnecessary to undertake to answer in detail the various contentions of your brief, many of the contentions being reiterations of protest [54] which add no strength to previous statements upon the same points, but it will suffice to say that I believe that the action of the Supervising Inspector was legal and perfectly regular, his conduct of the case was in accordance with intelligent and impartial procedure, and his conclusion and decision in accordance with the evidence adduced at the trial of Captain Alwen, and fully supported by the indictments attending the collision of the S. S. WEST HARTLAND and the S. S. GOVERNOR on the night of April 1, 1921.

7. The decision of the Supervising Inspector of the Eleventh District, United States Steamboat Inspection Service, Seattle, Washington, suspending the license of Coptain John Alwen for two years from July 22, 1921, is affirmed and the appeal respectfully dismissed.

Respectfully,

(Signed) GEO. UHLER,  
Supervising Inspector General.  
MH.

Approved:

(?)

Assistant Secretary of Commerce.

Aug. 24, 1921.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 28, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

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In the District Court of the United States for the  
Western District of Washington, Northern Division.

No. 276-E—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the  
United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Stipulation Allowing Defendants Time to Answer  
Amended Complaint.**

Come now the above-named plaintiff by his attorney, Howard G. Cosgrove, and the above-named defendants by their attorney, Frederick Milverton, and stipulate and agree that the said defendants may have twenty-five (25) days from the date hereof within which to answer plaintiff's amended complaint.

Dated this 28th day of September, 1921.

HOWARD G. COSGROVE,

Attorney for Plaintiff.

FREDERICK MILVERTON,

Attorney for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 276-E—(IN EQUITY).

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, DONALD AMES and HARRY C. LORD, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States,

Defendants.

**Answer of Defendants to Amended Complaint.**

Now come the defendants above named, and for answer to the amended bill of complaint of the

above-named plaintiff filed in the above-entitled court and cause, admit, deny and allege as follows:

I.

The said defendants admit all of the allegations contained in paragraph numbered I of said amended complaint.

II.

The said defendants admit all of the allegations contained in paragraph numbered II of said amended complaint.

III.

The said defendants admit all of the allegations contained in paragraph numbered III of said amended complaint.

IV.

Answering the allegations of paragraph numbered IV of said amended complaint, said defendants admit that the said plaintiff is by occupation a master mariner, and has devoted his lifetime to that avocation; deny that by reason of having devoted all of his time to this particular occupation he has been unable to [57] educate himself or gain any experience in any other occupation; deny that unless he is enabled to follow and pursue his said calling as a master mariner he will be unable to support himself and those dependent upon him as alleged in the said paragraph numbered IV of said amended complaint, and admit that the said plaintiff has held the licenses alleged in said paragraph numbered IV of said amended complaint except as hereinafter alleged, and in this behalf defendants allege that on or about December 20, 1918, the

license of the said plaintiff as master of steam vessels for all oceans and as pilot was suspended for a period of 4 months, which period of suspension was subsequently reduced to 3 months, because of negligence in not causing soundings to be taken in a locality where soundings could and should have been taken, and unskillfulness in the navigation of the steamship "Umatilla" which resulted on March 5th, 1918, in the stranding of said vessel and her ultimate loss on the coast of Japan, and said defendants further allege that the said plaintiff does not now and has not at any time since July 22d, 1921, held any license as master of steam vessels, or as pilot, the license theretofore held by him having been on said July 22, 1921, suspended for a period of two years by the said defendant William Fisher, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, as shown by Plaintiff's Exhibit "C" attached to said amended complaint.

V.

Said defendants allege that they have no knowledge or information sufficient to enable them to answer the allegations contained in paragraph numbered V of said amended complaint, and therefore deny the same. [58]

VI.

Said defendants admit all of the allegations contained in paragraph numbered VI of said amended complaint.

VII.

Said defendants admit all of the allegations con-



tained in paragraph numbered VII of said amended complaint.

### VIII.

Except as hereinafter specifically alleged said defendants admit all of the allegations contained in paragraph numbered VIII of said amended complaint.

### IX.

Said defendants allege that they have no information or belief sufficient to answer the allegation contained in paragraph numbered IX of said amended complaint that prior to May 17, 1921, said plaintiff did not receive any notice or information from anyone to the effect that the said defendant William Fisher intended to review the findings and decision of the local board, or to answer the allegation contained in said paragraph as to when the said plaintiff received the letter marked Plaintiff's Exhibit "B" attached to said amended complaint, and therefore deny said allegations, and except as hereinafter specifically alleged, said defendants admit all of the other allegations contained in paragraph numbered IX of said amended complaint.

### X.

Answering the allegations of paragraph numbered X of said amended complaint, said defendants allege; That on May 20, 1921, a hearing was commenced before the said defendant William Fisher, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, on charges preferred against the said plaintiff on May 16, 1921, for a

violation of Sections 4439 and 4450, of the Revised Statutes of the United [59] States, because of negligence, unskillfulness and inattention of the said plaintiff to his duties as master of the steamship "West Hartland" on the night of March 31, 1921, and the morning of April 1, 1921, in connection with the collision of said vessel with the steamship "Governor." That pursuant to charges and notice to appear dated May 16, 1921, a copy of which is attached to the amended complaint herein and marked Plaintiff's Exhibit "B," the said plaintiff, without any protest or objection whatsoever, appeared at said hearing so commenced on May 20, 1921, in person and by counsel. That between said May 20, 1921, and June 21, 1921, numerous hearings were had upon said charges, at all of which the said plaintiff was present personally and by counsel, and at none of which did the said plaintiff object to or protest against the right of the said William Fisher to make such charges or to hold such hearings, or make any reservation of any rights whatsoever. That on June 21, 1921, and during one of the hearings on said charges the attorney for the said plaintiff moved to dismiss the charges so filed by the said William Fisher as they appeared in the record in the case, on the ground and for the reason that nowhere in the statutes of the United States or in the regulations issued by the Board of Supervising Inspectors, approved by the Secretary of Commerce, was the power or authority given to the Supervising Inspector to hear charges as such inspector had attempted to do in said proceeding.

That upon said motion being overruled by the said defendant William Fisher, the plaintiff proceeded at said hearing to adduce evidence on his own behalf, without making any further or other objection to the right of the said William Fisher to hold said hearing in the manner and form the same was being had, and reserved no other claimed or alleged rights in the premises. [60]

#### XI.

Said defendants admit all of the allegations contained in paragraph numbered XI of said amended complaint.

#### XII.

Answering the allegations of paragraphs numbered XII of said amended complaint said defendants allege that upon the appeal referred to in said paragraph said plaintiff made no protest or objection further than that he in no way waived the question of jurisdiction or the right of the Supervising Inspector to prefer charges and hold a trial, and defendants allege that Plaintiff's Exhibit "D" and not Plaintiff's Exhibit "B" attached to said amended complaint is a copy of the letter of the Inspector General referred to in said paragraph.

#### XIII.

Said defendants admit all of the allegations contained in paragraph numbered XIII of said amended complaint.

#### XIV.

Said defendants allege that they have no information or belief sufficient to answer the allegations of paragraph numbered XIV of said amended com-

plaint, and therefore deny the same, except that the defendants admit that plaintiff will be unable to serve as master and, or pilot while his license therefor is under suspension as alleged in paragraph numbered XII (b) hereof.

XV.

Said defendants admit all of the allegations contained in paragraph numbered XV of said amended complaint.

XVI.

Said defendants deny all of the allegations contained in paragraph numbered XVI of said amended complaint.

XVII.

Said defendants deny all of the allegations [61] contained in paragraph numbered XVII of said amended complaint.

XVIII.

Said defendants deny all of the allegations contained in paragraph numbered XVIII of said amended complaint, except those relating to the force and character of the decisions referred to therein.

XIX.

Said defendants deny all of the allegations contained in paragraph numbered XIX of said amended complaint.

XX.

Said defendants deny all of the allegations contained in paragraph numbered XX of said amended complaint, and allege that this Honorable Court, sitting in equity, has not jurisdiction to hear or



determine upon the matters and things set out and alleged in said amended complaint.

### XXI.

Said defendants deny each and every other allegation contained in said complaint not herein specified admitted.

### XXII.

For further answer to the said amended bill of complaint said defendants allege;

(a) That the said defendant William Fisher, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, before the expiration of 30 days after the said defendants Donald Ames and Harry C. Lord, Local Inspectors, Steamboat Inspection Service, Department of Commerce of the United States, acting as a local board of steamboat Inspectors, had made and entered their findings and decision exonerating the said plaintiff from all blame or responsibility for the cause of the collision between the steamship "West Hartland" and the steamship [62] "Governor" as alleged in paragraph numbered VII of said amended complaint, upon his own motion reviewed the said decision and action of the said local board of Steamboat Inspectors, and upon such review, and prior to May 14, 1921, upon good and sufficient evidence concluded that the said plaintiff was in part to blame for said collision, and thereafter, and, to wit, on May 16, 1921, and in order to afford the said plaintiff an opportunity to be heard in the matter before the taking of final action by the said William Fisher in



the matter of revoking, changing or modifying the said decision and action of the said Board of Local Inspectors, made charges in writing against the said plaintiff, which said charges contained a notification to the said plaintiff to appear before him, the said William Fisher, to make answer to said charges, and that on said May 16, 1921, said William Fisher caused a copy of said written charges and notice to be duly mailed at the United States Postoffice in the City of Seattle, State of Washington, addressed to the said plaintiff at his true address in the said city of Seattle. That Plaintiff's Exhibit "B" attached to the amended complaint herein is a true copy of said charges and notice. That pursuant to said notice the said plaintiff appeared before the said William Fisher, and a hearing was had upon said charges as hereinbefore more particularly alleged. That the action of the said defendant William Fisher, in reviewing the decision and action of the said local Board of Inspectors, was done by the authority of and under and pursuant to the provisions of an Act of Congress approved June 10, 1918, entitled "An act to provide for appeals from decisions of boards of local inspectors of vessels and for other purposes."

(b) That thereafter, and on July 22, 1921, the said defendant, William Fisher, made his written findings and conclusions [63] and decisions by which among other things the license of the said plaintiff as master and pilot was suspended for a period of two years from July 22, 1921, and on said July 22, 1921, notified the said plaintiff of said find-

ings, conclusions and decision. That said Plaintiff's Exhibit "C" attached to said amended complaint is a true copy of said findings, conclusions and decision, and of said notification.

(c) That thereafter said plaintiff appealed from the said defendant William Fisher to the Supervising Inspector General, Steamboat Inspection Service, Department of Commerce of the United States and on August 23, 1921, the said Supervising Inspector General affirmed the findings, conclusions and decisions of the said William Fisher, and dismissed the said appeal of said plaintiff. That the said action of the said Supervising Inspector General was thereafter and on August 24, 1921, duly approved by the Honorable C. H. Huston, Assistant Secretary of Commerce, duly acting for the Secretary of Commerce. That Plaintiff's Exhibit "D" attached to said amended complaint is a true copy of the said decision of the said Supervising Inspector General.

(d) That shortly prior to the passage of said act of congress entitled "An Act to Provide for appeals from decisions of boards of local inspectors of vessels and for other purposes," the committee on the Merchant Marine and Fisheries of the House of Representatives of the United States, to whom the bill for such Act had been referred, submitted a report on said bill to said House of Representatives. That a copy of said report is hereto attached, marked Exhibit "A" and made a part hereof.

WHEREFORE the said defendants pray that said amended bill of complaint be dismissed with costs, and for such other and further relief in the

premises as to the Court may seem meet and proper.  
[64]

WILLIAM FISHER,  
Supervising Inspector for the Eleventh District,  
Steamboat Inspection Service, Department of  
Commerce of the United States,

DONALD S. AMES,  
HARRY C. LORD,  
Local Inspectors, Steamboat Inspection Service,  
Department of Commerce of the United States,  
Defendants Above Named.

FREDERICK MILVERTON,  
Special Assistant United States Attorney in Ad-  
miralty,  
Attorney for Said Defendants. [65]

State of Washington,  
County of King,—ss.

William Fisher, being first duly sworn on oath,  
deposes and says:

That he is one of the defendants in the above-en-  
titled cause; that he has read the foregoing answer  
of the defendant in said cause, and knows the con-  
tents thereof, and that the same is true of his own  
knowledge.

WILLIAM FISHER.

Subscribed and sworn to before me this 17th day  
of October, 1921.

[Seal] HARRIET L. SCOTT,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [66]

**Exhibit "A."****HOUSE OF REPRESENTATIVES.****64th CONGRESS,****1st Session.****REPORT****No. 495.****APPEALS FROM DECISIONS OF BOARD OF  
LOCAL INSPECTORS OF VESSELS.**

April 5, 1916.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. SAUNDERS, from the Committee on the Merchant Marine and Fisheries, submitted the following:

**REPORT.**

(To Accompany H. R. 13223).

The Committee on the Merchant Marine and Fisheries, to whom was submitted the following bill:

A BILL to provide for appeals from decisions of boards of local inspectors of vessels, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT whenever any person directly interested in or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any de-



cision or action of a supervising inspector of the Supervising Inspector General, whose decision, when approved by the Secretary of Commerce, shall be final; Provided, however, That application for such re-examination of the case by the supervising inspector or by the Supervising Inspector General shall be made within thirty days after the decision, or action, appealed from shall have been rendered or taken: And provided further, That in all cases reviewed under the provisions of this act where the issue is the suspension or revocation of the license of a licensed officer such officer shall be allowed to be represented by counsel and to testify in his own behalf.

Sec. 2. That whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision they shall report the case to the supervising inspector of the district, who shall investigate and decide the same; and any supervising inspector may within thirty days thereafter, upon his own motion, review any decision or action of any board of local inspectors within his district; and in like manner the Supervising Inspector General may within thirty days thereafter review any decision or action of any supervising inspector or board of local inspectors, and the decision of the Supervising Inspector General in such case shall, when approved by the Secretary of Commerce, be final. [67]

Sec. 3. That any decision or action reviewed by the Supervising Inspector General, or by any supervising inspector as provided in sections one and



two of this act, may be revoked, changed, or modified by such reviewing officer, who shall have power to administer oaths, and to summon and compel the attendance of witnesses by a similar process as in the district courts of the United States; and the disbursing clerk, Department of Commerce, shall pay, on properly certified vouchers, such fees to any witnesses so summoned, for his actual travel and attendance, as shall be officially certified to by the officer reviewing the case, not exceeding the rate allowed for fees to witnesses for travel and attendance in the district courts of the United States.

Sec. 4. That the Secretary of Commerce shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this act.

Sec. 5. That section forty-four and fifty-two of the Revised Statutes, as amended by section six of the act of March third, nineteen hundred and five, is hereby repealed—

respectfully reports the same back to the house without amendment, with the recommendation that it do pass.

The reasons for the enactment of this measure may be found in certain facts ascertained in the investigation of the EASTLAND disaster at Chicago in July 1915.

It developed in the course of that investigation that the action of the local inspectors was final under existing law, with relation to various situations vitally affecting the public interests. In con-

nection with this investigation the Secretary of Commerce secured the aid of several prominent men in Chicago who acted as an advisory committee. At the conclusion of the hearing these gentlemen made a number of recommendations. One of these recommendations was to the effect that in all cases where the power of decision of the local inspectors was final under existing law, an appeal shall be provided for all the parties directly concerned. The primary purpose of this bill is to afford this appeal, the course of the same being from the local inspectors to the supervising inspector and from the supervising inspector to the supervising inspector general. The provisions of this bill would allow an appeal to an officer convicted by the local inspectors of dereliction of duty, and in case of acquittal a like appeal is provided for the department.

Again, the local board of inspectors might make an entry in a certificate of inspection allowing the use of a less number of officers than the considerations of safe navigation for the vessel inspected would suggest as necessary and proper. Under these circumstances the owners of the vessel from motives of selfish personal interest might not take an appeal but would be willing to abide by the action of the inspectors. This bill provides in such a case not only for a review on his motion by the supervising inspector of any action of the local inspectors, but affords in addition an appeal from the decision of the local board, to any person directly interested in, or affected by its decision.

The reason for the passage of this measure, are both obvious and impelling. Appended will be found the letters of the Secretary of Commerce to the chairman of this committee, with the accompanying documents. [68]

DEPARTMENT OF COMMERCE.

Office of the Secretary,

Washington,

December 21, 1915.

My Dear Judge Alexander: I shall be glad if you will attach this letter to that which I have heretofore written you respecting H. R. 4783.

The inclosed is one of the regular accident reports made to me by the Steamboat-Inspection Service. Attached to it is a copy of the letter I have sent to the service in the matter. The penalty of 30 days' suspension of license for such violation of regulations as has resulted in this case in the sinking of the steamer and the loss of two lives is absurdly inadequate. Nothing can be done about it, however, by the department. There is no appeal. I can write the letter of which copy is herein, but if the inspectors see fit they can do the same thing again. The suspension should have been for at least six months. It is wholly wrong that the Government should find its hands tied in matters of this kind, and it is subversive of the discipline, which the service exists to preserve.

Yours very truly,

WILLIAM C. REDFIELD,

Secretary.

HON. J. W. ALEXANDER,  
House of Representatives,  
Washington, D. C.

DEPARTMENT OF COMMERCE.

Steamboat-Inspection Service.

Washington,

December 8, 1915.

THE SECRETARY OF COMMERCE:

Pursuant to instruction, you will please find below report of accident in which a vessel subject to the inspection of this service was concerned.

Names of Vessels: Towing Steamers Lackawana and Triton.

Line of Owner: Delaware, Lackawanna & Western Railroad Co., New York, N. Y., and the Independent Pier Co., Philadelphia, Pa., owners, respectively.

Officers in charge of vessel: M. Brophy and Thomas O. Moon, Masters, respectively.

Local district in which accident occurred; Boston.

Place of accident: Handkerchief Light Vessel.

Date of Accident: August 15, 1915.

Nature and extent of Accident: Collision, causing the towing Steamer LACKAWANNA to sink.

Cause of accident: Violation of regulations governing tows of seagoing barges on inland waters.

Number of lives lost: two.

Vessels were last inspected at Hoboken, N. J. and Philadelphia, Pa., respectively, on September 17, 1915, and May 18, 1915, respectively, by



C. Smith and H. McPherson, assistant inspectors of hulls, and W. G. Fenwick and C. A. Mattson, assistant inspectors of boilers.

Action taken: Case investigated and the licenses of [69] the masters of both these vessels were suspended for a period of 30 days.

REMARKS.—The barge NANTICOKE in tow of the tug TRITON collided with the tugboat LACKAWANNA, causing the latter to sink soon after. The mate and the cook of the Lackawanna were drowned, and the remainder of the crew of the LACKAWANNA, 14 men, were rescued in their lifeboat.

This case was investigated by the local inspectors at Boston and charges were preferred against the masters of these vessels. Mr. Brophy, master of the Lackawanna, was tried and found guilty of violation governing tows of seagoing barges on inland waters and his license was suspended for thirty days. Thomas O. Moon, master of the tug TRITON, failed to appear at his trial on the dates he was directed to do, and upon his failure, to appear the board convened for trial and entered a finding of guilty by default and his license was suspended for 30 days, said suspension to begin on the date of the receipt of his license by the local inspectors.

The matter of the short period of the suspension of these men's licenses was taken up by this office with the local inspectors. The local inspectors advised that in arriving at the term of suspension they did not consider any extenuating



circumstances, although certain conditions existed that might be considered extenuating.

GEO. UHLER.

December 21, 1915.

SUPERVISING      INSPECTOR      GENERAL,  
STEAMBOAT-INSPECTION SERVICE:

I am sending to the chairman of the House of Representatives Committee on Merchant Marine and Fisheries accident report 71663 of December 8, respecting the loss of the towing steamer LACKAWANNA, and with it goes a copy of this letter. I am using this example to urge the enactment of H. R. 4783, which would give the department the right of appeal from such absurd decisions as that in the present case.

Here is a case in which it is admitted that the captain of a towing steamer so acted that a collision ensued causing the loss of towing steamer LACKAWANNA with two lives. The penalty is a suspension of license for 30 days. It is hard for me to conceive the condition of mind in which so trifling a penalty is imposed for so serious an offense. The regulations intended to save life and property were broken and loss of life and property both ensued. What worse offense is there that a marine captain could commit than this? It is not the absence of skill that is charged. It is not in the strictest sense an accident that is charged. It is a violation of regulations causing the death of human beings and the loss of a steamer. I should expect to see in a case of this kind an indefinite

suspension of license, or certainly one for a period of not less than six months. I deeply regret that the law seems such that charges cannot be brought against the local inspectors who impose this trivial penalty for neglect of duty. [70]

I wish you to impress upon them that I regard them as having been derelict and as deserving of a severe reprimand. I trust in future cases they may show a higher sense of the value of human life and of the purpose for which they sit in judgment on violators who by such violations cause loss of life and property.

WILLIAM C. REDFIELD,

Secretary.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 24, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [71]

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In the United States Court for the Western District  
of Washington, Northern Division.

IN EQUITY—No. 276—E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the

U. S., DONALD AMES, and HARRY C. LORD, Local Inspectors, Steamboat Inspection Service, Department of Commerce of U. S.,

Defendants.

**Decision.**

Filed Jan. —, 1922.

FREDERICK MILVERTON, Special Asst.

U. S. Attorney, Attorney for Defendants.

HOWARD G. COSGROVE, Attorney for Plaintiff.

NETERER, District Judge.

Shortly after midnight, April 1, 1921, the S. S. "West Hartland" and the S. S. "Governor" collided as a result of which the "Governor" immediately sank. The plaintiff was acting Master of the "West Hartland." After the collision the Board of Local Inspectors investigating the collision found that Harry H. Marden, in charge of the S. S. "Governor," culpable, and exonerated the plaintiff, Master in charge of the S. S. "West Hartland," and filed written findings and decision of the 16th of April, 1921. The proceeding is entitled:

"IN THE MATTER OF THE INVESTIGATION  
OF THE COLLISION BETWEEN THE S. S.  
"GOVERNOR" AND "WEST HARTLAND"  
APRIL 1, 1921, OFF POINT WILSON, RE-  
SULTING IN THE SINKING AND LOSS  
OF S. S. "GOVERNOR."

On the 16th of May following, the defendant Supervising Inspector sent the following letter to the Master of the "West Hartland":

“You are hereby charged with violation of the U. S. R. S. Statutes, Secs. 4439 and 4450, with negligence, unskillfulness and inattention to your duty as Master of the S. S. WEST HARTLAND on the night of March 31, 1921, and the morning of April 1, 1921, in this, that being in doubt as to the [72] course and intention of the S. S. GOVERNOR, as that vessel and the WEST HARTLAND were approaching each other, your failure to signify your lack of understanding, which resulted in the collision of the WEST HARTLAND and GOVERNOR; and further, in this, that, having signaled the GOVERNOR to hold course and speed, failed to do so, but without informing the GOVERNOR thereof, you stopped and reversed engines, which resulted in the collision of the WEST HARTLAND and GOVERNOR; and further, in this, that when the collision was imminent you did not take proper measures to avoid collision between the WEST HARTLAND and GOVERNOR.

“At your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire.”

Thereafter, on July 22d, the Supervising Inspector rendered the following findings, conclusions and decision under the style:

“IN THE MATTER OF THE TRIAL OF CHARGES PREFERRED BY THE U. S. SUPERVISING INSPECTOR, ELEVENTH DISTRICT, AGAINST CAPTAIN JOHN ALWEN, MASTER OF THE S. S. WEST HARTLAND, IN CONNECTION WITH THE COLLISION BETWEEN THAT VESSEL AND THE S. S. GOVERNOR ON THE MORNING OF APRIL 1, 1921.

\* \* \* \* \*

“DECISION.

“I, therefore, hold and it is my decision that Captain John Alwen is guilty of negligence, unskillfulness, and inattention to his duties as Master of the S. S. West Hartland \* \* \* in connection with the collision between that vessel and the S. S. Governor, and his license as Master and Pilot, No. 73609, issue No. 5, 5, dated December 2, 1918, is hereby suspended for a period of two years, from this date July 22d, 1921. Captain Alwen is directed to deposit his license with the U. S. Local Inspectors at Seattle, where it will remain during the period of its suspension.”

The plaintiff contends that the Supervising Inspector acted without jurisdiction and that his decision is void; that he has no speedy and adequate remedy at law. The defendant Inspector claims that he had jurisdiction, and acted in accordance with law; that plaintiff appeared, presented testimony, and may not now complain. The plaintiff admits appearing, but contends that he protested the juris-



diction and objected to the proceedings. If the Supervising Inspector was without jurisdiction and his action without warrant of law the appearance of the plaintiff did not confer jurisdiction. The Supervising Inspector may do that which the law authorizes him to do through the procedure which is provided. It is conceded that under the law prior to June 10, 1918, 40 Stat. 606, there was no warrant of law which gave the Supervising Inspector the right to proceed as he did in this case. It is [73] contended that under the act *supra*, the Supervising Inspector may within 30 days after any decision of the Local Board of Inspectors, review such decision upon his own motion, and that after such review he may *revoke, change, or modify* such decision. The act *supra* is entitled:

“An act to provide for appeals from decisions of Boards of Local Inspectors of vessels and for other purposes.”

The particular object of the act in this case is to provide for *appeals*, and

“That whenever any person \* \* \* feels aggrieved \* \* \* he may appeal \* \* \* to the Supervising Inspector \* \* \* provided, however, that application for such re-examination of the case by the Supervising Inspector \* \* \* shall be made within 30 days after the decision \* \* \* appealed from, and shall have been rendered.”

The words “*such re-examination*” refers to the word *appeal* in the preceding portion of the section, hence “*appeal*” and “*such re-examination*” must be

held as synonymous terms. The rules and regulations provided pursuant to law, Sec. 4405, R. S., and which rules have the force of law, *Fridenberg vs. Whitney et al.*, 240 Fed. 819, 824. Under title II, Appeal to Supervising Inspector, Sec. 1, provides:

“The inspector, upon notice of appeal from the decision of the Local Board, provided said notice of appeal shall be made within 30 days of the decision of the Local Board, shall give notice in writing to said Board to forward certified copy of their decisions together with the charges and all evidence in writing on file in their office.”

The prerequisites, therefore, necessary to effect an appeal, are plainly set forth in the Rules and Regulations, which have the force of law.

Prior to the act *supra* there was not provision for appeal except by an interested party, 240 Fed. 817, and the following was provided in Sec. 2.

\* \* \* “Any Supervising Inspector may, within 30 days, thereafter, upon his own motion review any decision or action \* \* \* within his district.”

and Sec. 3 provides that; if the Supervising Inspector, upon his own motion, decides his review, the same provisions apply. The same procedure applies in effecting appeal by the Supervising [74] Inspector as to an appeal by an interested party, and the same notice must be given to the Local Board. In other words, the case must be removed from the Board of Local Inspectors. Upon removal of the case the Supervising Inspector must

then proceed under the same rules prescribed for the hearing before the Local Board (Rule 2). The procedure provided is definite and explicit.

Appeal has a definite, clear and well understood meaning in all legal procedure, and its function is to revise and correct the proceedings already instituted and does not create that cause, *Wilson vs. Mason*, 1 Cranch, 44 (U. S.), 2 Law Ed., 60. An appeal is the removal of a cause from a court of inferior to one of superior jurisdiction for review. *Greenwood County vs. Town of New Hartford*, 32 Atl. 933 (Conn.). Appeal is a process of civil origin and removal of the cause entire for review and re-trial, *Lyle vs. Barnes*, 40 Miss. 608. The legal significance of appeal means appellate process which opens the former judgment and sends the case to a higher court for a trial *de novo* upon the same facts or new facts regardless of the former trial, *Richardson vs. Henderson*, 37 S. E. 653 (W. Va.). The record shows that there was no removal. The only act of the Supervising Inspector is filing the charges *supra*, on the 16th day of May, without reference to the proceeding before the Local Board in the "matter of the investigation of the collision. \* \* \* , by the Local Board. Lord, one of the Local Inspectors, in answer to, "Q. Was there ever any appeal taken by anyone from that decision to the Supervising Inspector? A. No." The Supervising Inspector testified that when the findings and decision of the Local Board was submitted "in the usual way" on April 18th, that he began a very thorough study and analysis of the same, and that on the 14th

of May he sent a telegram to the "Bureau" as follows: [75]

"My investigation satisfies me that charges should be filed against Master 'West Hartland' who was exonerated in investigation of Local Board. Have I power to file charges direct and proceed to try case, or should I order Local Board to file charges."

And in response to this telegram on the morning of the 16th of May he was advised by the "Bureau" that "he did have authority to prefer the charges and conduct trial." He further testified:

"Although my review of the testimony convinced me that Captain Alwen was culpable in his management of the 'West Hartland,' I desired to afford him an opportunity to testify in his own behalf, and, in order to proceed in a definite way, I decided to present the matter in the form of charges."

It appears to be conclusively established that no appeal was taken, and that no review in any legal sense was had. This is further confirmed by the fact that the "investigation" of the Local Board concerned others named in the decision, whereas, the "direct charge" concerns only one of the parties named in the decision, the plaintiff; and from the decision of the Supervising Inspector. The act *supra* provides, that the decision of the Local Board may be *revoked*, *changed*, or *modified*, by the reviewing officer. The decision of the Supervising Inspector does not refer to the decision of the Local Board. The title of the proceeding is a separate



and distinct title, from the proceeding before the Local Board, and the testimony of the Supervising Inspector is to the effect that the proceeding was a "direct charge," rather than a review on appeal, although, in proceeding on review, after appeal, he was empowered by the act *supra*, as well as by the rules and regulations to hear further testimony, and to administer oaths to witnesses. The proceeding is somewhat akin to an appeal in Admiralty trials, where the Circuit Court of Appeals, in reviewing the case, may receive further testimony in determining the pending issue. It is not contended at bar, nor suggested in the brief, and I know of no warrant of statute that empowers the Supervising Inspector to file charges before himself, and hear and determine the same upon [76] an issue such as is here presented. The sole function is what the title indicates, Supervising Appellate Tribunal, and to determine an issue on appeal the matter must be removed from the Local Inspection *Court* to that of the Supervising Inspector's Appellate *Court*, within 30 days, and provision is made by statute for the removal and the procedure provided by law; and after removal the matter may be considered upon the evidence before the Local Board, or further testimony may be taken. The fact that the Supervising Inspector, on June 24th, "notified" Captain Alwen, the plaintiff, that "in this hearing" he was proceeding as on continuance of the review "undertaken of the decision of the Local Inspectors" cannot confer jurisdiction, because, no appeal or review had been taken and the proceeding instituted



was a "direct charge." The decision of the Supervising Inspector is without warrant of law and may not be enforced.

NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 3, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [77]

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In the United States Court for the Western District  
of Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the  
United States, DONALD AMES, and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Decree.**

This cause having regularly come on for trial before the Court on the 10th day of January, 1922, said plaintiff appearing by his attorney Howard G. Cosgrove and the said defendants appearing by their attorney Frederick Milverton, Special Assis-

tant United States Attorney, and evidence having been introduced, all parties resting, and the cause having been submitted to the Court upon briefs, and the Court having heretofore on the 2d day of February, 1922, filed herein his memorandum decision;

The Court does hereby find:

1. That the said defendant William Fisher was, on the 1st day of April, 1921, ever since has been, and now is, a resident and citizen of the city of Seattle, State of Washington, and the duly appointed, qualified and acting Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States with headquarters at Seattle, Washington.

2. That the said defendants Donald Ames and Harry C. [78] Lord were on the 1st day of April, 1921, ever since have been, and now are, residents and citizens of the city of Seattle, State of Washington, and respectively United States Inspector of Hulls and United States Inspector of Boilers, Steamboat Inspection Service, Department of Commerce of the United States, together making the Local Board of Steamboat Inspectors for said Steamboat Inspection Service, Department of Commerce of the United States and with headquarters at Seattle, Washington.

3. That the said plaintiff on the 3d day of March, 1921, and ever since has held and does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and other waters, said license numbered 73,609, is-

sue No. 5, 5, the same having been issued for the period of five years from December 2, 1918.

4. That the value of the said license to the said plaintiff at the time of the commencement of this action and ever since has been and is now more than the sum of \$3,000.00.

5. That on and during the 1st day of April, 1921, the said plaintiff was the duly appointed and acting master of the United States steamboat "West Hartland"; that on said date said vessel collided with the steamboat "Governor" in the vicinity of Point Wilson, Washington, in the waters of Puget Sound.

6. That the said defendants Donald Ames and Harry C. Lord, as such Local Board of Steamboat Inspectors, immediately upon said collision taking place, investigated the same and found Harry H. Marden in charge of the "Governor" culpable and exonerated the plaintiff master in charge of the "West Hartland" from all responsibility for said collision, filing their written findings and decision on the 16th of April, 1921.

7. That no appeal from said findings and decision as affecting said plaintiff was ever taken, and that no review of [79] said findings and decision was ever had.

8. That on July 22, 1921, the said defendant William Fisher, as said Supervising Inspector, mailed to the said plaintiff the following findings, conclusions and decision under the style:

“IN THE MATTER OF THE TRIAL OF CHARGES PREFERRED BY THE U. S. SUPERVISING INSPECTOR, ELEVENTH DISTRICT, AGAINST CAPTAIN JOHN ALWEN, MASTER OF THE S. S. WEST HARTLAND, IN CONNECTION WITH THE COLLISION BETWEEN THAT VESSEL AND THE S. S. GOVERNOR, ON THE MORNING OF APRIL 1, 1921.”

\* \* \* \* \*

“I, therefore, hold and it is my decision that Captain John Alwen is guilty of negligence, unskillfulness, and inattention to his duties as Master of the S. S. West Hartland \* \* \* in connection with the collision between that vessel and the S. S. Governor, and his license as Master and Pilot, No. 73609, issue No. 5, 5, dated December 2, 1918, is hereby suspended for a period of two years, from this date July 22d, 1921. Captain Alwen is directed to deposit his license with the U. S. Local Inspectors at Seattle, where it will remain during the period of its suspension.”

which findings, conclusion and decision are more particularly set forth in Plaintiff's Exhibit “C” attached to and made a part of plaintiff's complaint.

9. That the said defendant William Fisher, as such Supervising Inspector, threatens to enforce his said order suspending the said license of the said plaintiff.



10. That by reason of the said defendant William Fisher's said findings, decision and order and his said threat to enforce said order, the said plaintiff has been irretrievably damaged and has no plain, speedy and adequate remedy at law in the premises.

11. That since March 31, 1921, neither the said defendant William Fisher, as said Supervising Inspector, nor the said Supervising Inspector General ever acquired jurisdiction over [80] the said plaintiff or his said license or his right to use and enjoy the same on account or by reason of the conduct or actions of said plaintiff as master of said "West Hartland" immediately preceding, at, and immediately after the said collision, or on account or by reason of said findings and decision of said Local Board, or at all.

NOW, THEREFORE, it is considered, ordered, adjudged and decreed by the Court:

1. That the said findings, decision and order of the said defendant William Fisher, as such Supervising Inspector, and the decision and order of the Supervising Inspector General affirming the said defendant William Fisher's said findings, decision and order are null and void.

2. That the said defendant William Fisher, as Supervising Inspector, is hereby perpetually enjoined from filing with said Local Board his said findings, decision and order, or either or any of them, or any decision or order, or any findings, decision, or order in any wise reversing, changing or modifying the said findings and decision of the said



Local Board as to the said plaintiff or his license, or from doing anything tending to reverse, modify or change said decision and order of said Local Board as to the said plaintiff or his said license in the said proceeding.

5. That the said defendants Donald Ames and Harry C. Lord, as such Local Board, are hereby perpetually enjoined from placing on file with the records of said Local Board, or from complying with, recognizing or receiving any findings, decision or order of the said defendant William Fisher, as Supervising Inspector, or from the said Supervising Inspector General, or anyone else, tending to modify, change or reverse their said decision as such local board as to the said plaintiff; and that they, as such [81] Board, and each of them, are perpetually enjoined from cancelling or suspending the said license of the said plaintiff for or on account of his actions or conduct immediately preceding, at, or immediately following said collision, provided,

That if prior to the entering of this order the said defendant William Fisher, as such Supervising Inspector, or the said Supervising Inspector General shall have filed with said Local Board any findings, or order suspending or cancelling the license of the said plaintiff.

To all of which deft. excepts.

Done in open court this 21st day of February, 1922.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 21, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [82]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Assignments of Error.**

Come now the above-named defendants, by and through their attorneys, Thomas P. Revelle and John A. Frater, and respectfully submit the following assignments of error upon which they rely as supporting their appeal from the judgment and decree entered on the 21st day of February, 1922, in said cause in the District Court of the United States for the Northern Division of the Western District of Washington and under which assign-

ments of error said appellants seek reversal of the decision, judgment and decree of said trial Court:

I.

That the District Court erred in finding that the plaintiff on the 3d day of March, 1921, and ever since has held and does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and other waters, said license numbered 73609, issue No. 5, 5, the same having been issued for the period of five years from December 2, 1918.

II.

That the District Court erred in finding that the value of the said license to the said plaintiff at the time of the commencement of this action and ever since has been and is now more than the sum of \$3,000.00. [83]

III.

That the District Court erred in finding that no appeal from the written findings and decision of the defendants Donald Ames and Harry C. Lord filed on April 16th, 1921, as affecting said plaintiff, was ever taken, and that no review of said findings and decision was ever had.

IV.

That the District Court erred in finding that by reason of the findings, conclusion and order of the defendant William Fisher, mailed to the plaintiff on July 22d, 1921, and of said William Fisher's threat to enforce said order, the said plaintiff has been irretrievably damaged and has no plain, speedy and adequate remedy at law in the premises.

## V.

That the District Court erred in finding that since March 31st, 1921, neither the said defendant William Fisher, as said Supervising Inspector, nor the Supervising Inspector General ever acquired jurisdiction over the said plaintiff or his said license or his right to use and enjoy the same on account or by reason of the conduct or actions of said plaintiff as master of said "West Hartland" immediately preceding, at, and *a* immediately after the said collision, or on account or by reason of said findings and decision of said Local Board, or at all.

THOS. P. REVELLE,

United States Attorney.

JOHN A. FRATER,

Assistant United States Attorney,

Attorneys for Defendants.

Due receipt of a copy of the foregoing assignments of error is hereby acknowledged this — day of August, 1922.

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Attorney for Plaintiff. [84]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 21, 1922. F. M. Harshberger, Clerk.  
[85]

United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

### **Petition for Appeal.**

Come now the above-named defendants, through  
their attorneys, Thomas P. Revelle and John A.  
Frater, feeling themselves and each of them ag-  
grieved, do hereby appeal from the judgment and  
decree signed and entered in the foregoing cause on  
the 21st day of February, 1922, in the District Court  
of the United States for the Western District of  
Washington, Northern Division, and from each and  
every part thereof, and do herewith present their  
several assignments of error, and do hereby pray  
the allowance of said appeal and that so much and  
such portions of the record, the statement of facts  
and exhibits as may be necessary to execute said  
appeal, be forwarded from said court by the Clerk



of the District Court of the United States for the Northern Division of the Western District of Washington, duly certified and authenticated under the seal of the said trial Court to the Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,

United States Attorney.

JOHN A. FRATER,

Assistant United States Attorney,

Attorneys for Defendants.

Due receipt of a copy of the foregoing petition and appeal is hereby acknowledged this —— day of August, 1922.

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Attorney for Plaintiff. [86]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 21, 1922. F. M. Harshberger, Clerk. [87]

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United States District Court, Western District of Washington, Northern Division.

No. 276-E —IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the Eleventh District, of Steamboat Inspection Service, Department of Commerce of the United States, DONALD AMES and

HARRY C. LORD, Local Inspectors, Steam-boat Inspection Service, Department of Commerce of the United States,

Defendants.

**Order Allowing Appeal.**

BE IT REMEMBERED: That this matter came on duly for hearing on the petition of the defendants, through their attorneys, Thomas P. Revelle and John A. Frater, for the allowance of their petition and appeal in the foregoing entitled cause from the judgment of this Court entered on the 21st day of February, 1922, and the said appeal being from said judgment to the Circuit Court of Appeals of the United States of America for the Ninth Circuit; and this Court being fully advised in the premises;

IT IS HEREBY ORDERED that the said appeal be allowed as prayed for and the Clerk of this Court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal, together with exhibits and other matters of record and the memorandum decision and formal judgment and decree of this court, all duly authenticated, and send same to the said Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 21st day of August, 1922.

EDWARD E. CUSHMAN,

Judge. [88]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Aug. 21, 1922. F. M. Harshberger, Clerk.  
[89]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Exception to Decree.**

Come now the above-named defendants, by their  
attorneys, Thomas P. Revelle and John A. Frater,  
and respectfully except to the decree and findings  
heretofore made and entered by the Court in the  
above-entitled cause.

This exception is based upon the ground and for  
the reason that the decree and findings herein are  
contrary to the facts and the law applicable to this  
case.

THOS. P. REVELLE,  
United States Attorney.

JOHN A. FRATER,  
Assistant United States Attorney.

The foregoing exception is hereby allowed this 28 day of December, 1922.

JEREMIAH NETERER,  
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [90]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Order Extending Time to November 1, 1922, for  
Filing Statement of Evidence.**

BE IT REMEMBERED: That this matter came  
on duly and regularly before this court upon the ap-  
plication of the United States Attorney, and it ap-  
pearing that this court is recessed during most of

this time and will be the greater portion of September, and that it will be difficult for Honorable Jeremiah Neterer, one of the Judges of this court, to settle the evidence in this case within the usual period; that the time for filing the statement of evidence be extended, now, therefore, it is hereby

ORDERED AND ADJUDGED that appellant's time for filing a proposed statement of evidence be and is hereby extended for a period of thirty days from and after the usual ten days allowed after the entry of the order allowing the appeal, or until November 1, 1922.

Done in open court this 21st day of August, 1922.

EDWARD E. CUSHMAN,  
District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 21, 1922. F. M. Harshberger, Clerk.  
[91]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspection Service, Department of Commerce of



the United States, DONALD AMES and HARRY C. LORD, Local Inspectors, Steamboat Inspection Service, Department of Commerce of the United States,

Defendants.

**Order Extending Time to November 29, 1922, for  
Filing Statement of Evidence.**

BE IT REMEMBERED: That this matter came on duly and regularly before this court, upon the application of the United States Attorney, and it appearing from his statement made in open court that the office of the United States Attorney has been unduly and more than usually congested with work during the past sixty (60) days, and that this condition is in nowise on account of any fault or lack of ability on the part of the United States Attorney, or his assistants, and that the time for filing the statement of evidence in this cause should be further extended for a period of thirty (30) days, now, therefore, it is

ORDERED AND ADJUDGED that appellants' time for filing the proposed statement of evidence be, and is hereby, extended for a period of thirty (30) days from and after this date.

Done in open court this 31st day of October, 1922.

JEREMIAH NETERER,

District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 31, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [92]

United States District Court, Western District of  
Washington, Northern Division.

No. 276.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Order Extending Time to December 28, 1922, for  
Filing Statement of Evidence.**

BE IT REMEMBERED: That this matter came  
on duly and regularly before this Court, upon the  
application of the United States Attorney, and it  
appearing from his statement made in open court  
that the office of the United States Attorney has  
been unduly and more than usually congested with  
work during the past sixty (60) days, and that this  
condition is in no wise on account of any fault or  
lack of ability on the part of the United States At-  
torney, or his assistants, and that the time for filing  
the statement of evidence in this cause should be  
further extended for a period of thirty (30) days,  
now, therefore, it is

ORDERED AND ADJUDGED that appellants' time for filing the proposed statement of evidence be, and is hereby, extended for a period of thirty (30) days from and after this date.

Done in open court this 29th day of November, 1922.

JEREMIAH NETERER,

District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [93]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of  
Commerce of the United States,

Defendants.

**Order Directing Transmission of Original Exhibits  
to Circuit Court of Appeals for the Ninth Cir-  
cuit.**

Upon motion of the attorneys for the defendants above named, and it appearing to the Court that there were introduced into evidence at the trial of the above-entitled suit certain original exhibits, to wit, Plaintiff's Exhibit No. 1, and Defendants' Exhibits "A," "B," "C," "D," and "E," and it further appearing to the Court that it is proper that such original files be sent up on appeal as part of the record and proceedings on appeal for inspection and consideration by the Circuit Court of Appeals, and the Court being further of the opinion that the expense of printing in said files and the transcript of record is not necessary to the proper consideration of the appeal or justified by the exigencies of the cause,—

It is ordered that the Clerk of the above-entitled court be, and he is hereby directed to transmit the aforesaid [94] exhibits to the Circuit Court of Appeals for the Ninth Circuit, to be considered by said court of appeals as a part of the record in this cause, but not to be printed.

Done in open court this 12th day of January, 1923.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jan. 11, 1923. F. M. Harshberger, Clerk.  
By S. E. Leitch, Deputy. [95]

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United States District Court, Western District of  
Washington, Northern Division.

IN EQUITY—No. 276-E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector of  
the Eleventh District, Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of  
Commerce of the United States,

Defendants.

**Notice of Filing of Statement of Evidence.**

To John Alwen and Howard G. Cosgrove, His  
Attorneys:

You, and each of you, will please take notice that William Fisher, Supervising Inspector of the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States; Donald Ames and Harry C. Lord, Local Inspectors, Steamboat Inspection Service, Department of Commerce of the United States, the defendants above named, have this day filed and lodged with the clerk of the above-entitled court their proposed statement



of the evidence herein, a copy of which is herewith served upon you.

You are further notified that the above-named defendants will appear before the above-entitled court on the 10th day of January, 1923, at 10 o'clock A. M., then and there to make application for the approval and settlement of said statement of facts by said court.

THOMAS P. REVELLE,  
United States Attorney,  
DEWOLFE EMORY,  
Assistant United States Attorney,  
Attorneys for Defendants.

Service of a true copy of the above notice of filing of statement of evidence together with a true copy of defendants' proposed statement of evidence Dec. 1922.

HOWARD G. COSGROVE,  
Attorney for Plaintiff. [96]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [97]

United States District Court, Western District of  
Washington, Northern Division.

IN EQUITY—No. 276-E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors, Steam-  
boat Inspection Service, Department of  
Commerce of the United States,

Defendants.

**Order Approving Statement of Evidence on Appeal.**

The following is a true, complete and properly prepared statement of the substance of all the testimony introduced and admitted upon the trial of the above-entitled cause in the United States District Court for the Western District of Washington, Northern Division, and, together with the original exhibits therein and herein referred to and hereby made a part of said statement, constitute all of the evidence and exhibits introduced and admitted in evidence upon said trial essential to the decision of the questions presented by the appeal heretofore petitioned for herein by the defendants and allowed from the final judgment in this cause in said District Court at said trial, and said statement is hereby approved.

Dated at Seattle, Washington, this 15th day of January, 1923.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 15, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [98]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 276—E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector of the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, DONALD AMES and HARRY C. LORD, Local Inspectors, Steamboat Inspection Service, Department of Commerce of the United States,

Defendants.

**Statement of Facts.**

STATEMENT OF FACTS Occurring at the Trial of the Above-entitled Cause, Proposed by the Defendant, for Certification on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial, in the above-entitled court, before the Honorable Jeremiah Neterer, Judge of the said court, sitting in Equity, at Seattle, Washington, on the 10th day of January, 1922, at the hour of ten o'clock A. M. of said day, the respective parties being represented as follows:

John Alwen, the plaintiff above named, being represented by Howard G. Cosgrove, Esquire; and William Fisher, Supervising Inspector of the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, Donald Ames and Harry C. Lord, Local Inspectors, Steamboat Inspection Service, [99] Department of Commerce of the United States, defendants above named, being represented by Frederick Milverton, Esquire, Special Assistant to the United States Attorney.

The statement of the issues involved was then made by the attorneys for the respective parties, and thereupon the following testimony was introduced on behalf of the plaintiff:

**Testimony of John Alwen, for Plaintiff.**

JOHN ALWEN, called as a witness on behalf of the plaintiff, was sworn and testified as follows:

My name is John Alwen. I am the plaintiff in this case and reside at #2023 Boylston Avenue North, Seattle. By occupation I am a master mariner and have been engaged in the maritime business since May, 1879. I am 59 years of age and have a family consisting of a boy and a girl. My wife and daughter are dependent upon me. On April 1st I was master of the SS. "West Hartland" which had a collision with the SS. "Governor" on that day. After that time the Local Board, the defendants in this case, held a hearing at which I appeared. I had a verbal order to go to the Local Inspector's office. After the hearing before the Local Board I appeared as a witness only. The Local Board never preferred any charges against me on account of my actions at the time of the collision. No one else has ever preferred any charges against me except Captain Fisher.

THEREUPON, the witness was handed a copy of Plaintiff's Exhibit "B" as it appears in the pleadings and then testified as follows: [100]

That is a copy of Captain Fisher's letter to me which I received on May 17th, the day after it is dated. It came to me through the mail.

THEREUPON the document was introduced in evidence without objection and marked Plaintiff's Exhibit 1. The witness proceeded as follows over



(Testimony of John Alwen.)

the objection of counsel for the defendants as to the materiality of the question:

I had no knowledge or information from any source prior to the receipt of this letter that the defendant Fisher was reviewing, or intending to review, the decision of the Local Board. My salary as master of the "West Hartland" at the time of the collision was \$357.50. I am familiar with the present going wage of masters of similar vessels at this port, and there has been a 15% reduction on those wages since May, or the time of the collision.

On cross-examination, the witness JOHN ALWEN testified as follows:

The first notice I had that Captain Fisher was reviewing the decision of the Board of Local Inspectors was the letter on May 17th, the letter which has just been received in evidence. From that letter I understood that Captain Fisher was preferring charges against me and wished me to call at his office at my earliest convenience, which I did. The first I knew that Captain Fisher was reviewing the decision of the Board of Local Inspectors was the first day of the trial, that is, at the first day of the trial before Captain Fisher. [101] I have alleged in my bill that I am not qualified for any other business except master. I cannot say whether I am qualified as a port captain, as I have never held that position. I know the duties of a port captain. I could not fill the office of superintendent of stevedores now. I might have done so ten or fifteen years ago.

(Witness excused.)

**Testimony of Harry C. Lord, for Plaintiff.**

HARRY C. LORD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is Harry C. Lord. I am one of the defendants in this action and a member of the Local Board of Steamboat Inspectors. I am familiar with the records of my office as they now exist and have existed since April 1, 1921. I recollect the reference previously made in this case to the collision between the "Governor" and the "West Hartland" and to a hearing by the Local Board subsequent to that collision. The Local Board made findings and a decision which exonerated Captain Alwen.

Q. Was there ever any appeal taken by anyone from that decision to the Supervising Inspector?

Mr. MILVERTON.—I object to that as incompetent, irrelevant and immaterial. The new law provides several ways by which it may be reviewed.

The COURT.—Let it go in the record and get both of your views of it.

A. No. [102] Captain Fisher, as Supervising Inspector, never asked the Local Board to correct its findings and decision. Nor did he ever officially ask the Local Board to explain its findings and decision; only in conversation. He made no request for any explanation or correction. Captain Fisher never filed any charges with the Local Board against Captain Alwen on account of this collision. At the time the local hearing was had there were

(Testimony of Harry C. Lord.)

no charges then pending before the Local Board against Captain Alwen. Captain Alwen appeared before the local board as a witness only. The Local Board furnished to Captain Fisher a certified copy of the testimony taken before it at its hearings.

Q. Since this case was begun, has Captain Fisher, as Supervising Inspector, or the Supervising Inspector General, filed with your Local Board any order or decision tending to affect or change or modify your finding or decision as to Captain Alwen? A. None whatever.

Mr. MILVERTON.—Same objection, as not required by the statute, may it please your Honor.

The COURT.—How is that?

Mr. MILVERTON.—I make the same objection.

The COURT.—Yes.

Mr. MILVERTON.—As being incompetent, irrelevant and immaterial.

The COURT.—Yes.

Mr. MILVERTON.—And not required by statute.

Mr. COSGROVE.—This is an equitable action, and we can't keep track of all the orders that might have been issued. [103]

The COURT.—He may answer.

A. None whatever.

On cross-examination, the witness HARRY C. LORD testified as follows:

I held the investigation under the statute and regulations by which we are supposed to investigate the cause of any disaster of the kind. Captain Alwen was brought before us by oral summons.

(Testimony of Harry C. Lord.)

He was not subpoenaed; just an oral invitation to appear the same as the rest of the witnesses. I followed the usual procedure that is generally followed in matters of that kind. The object was the fixing of responsibility by investigation. Captain Alwen was exonerated by us. There was no official request for any explanation or correction of our decision from Captain Fisher. No request was made whatever by Captain Fisher. There was a conversation had after the decision; I could not tell how long after. We found nothing to warrant our preferring charges against Captain Alwen. Our investigation was to see whether Captain Alwen was in part responsible for the collision or whether there was any violation under the statutes in regard to navigation for which he was responsible as a licensed officer. Captain Alwen probably knew this. He only appeared as a witness. He was not present at the rest of the hearing. He made no request to be present at any of the rest of [104] the hearing. I do not remember whether Captain Alwen received a written request to be present at the hearing or not. He reported at the office the matter pertaining to the collision and it naturally followed that he was to appear as a witness and to bring such witnesses as a master of a vessel would bring—such witnesses as he knew would have any knowledge of the subject. We gave him that opportunity to produce whatever witnesses he wanted to, and we questioned other witnesses to find out whether or not we could add to the testimony. We wanted to get



(Testimony of Captain William Fisher.)

it all. We had to depend upon him for the names of members of his crew or somebody connected with the vessel.

(Witness excused.)

THEREUPON counsel for the plaintiff called the Court's attention to a typographical error on page 5, line 9, of the amended complaint, stating that the exhibit thereat referred to as Plaintiff's Exhibit "B" should be changed to Plaintiff's Exhibit "D." The correction was allowed by the Court.

(Plaintiff rests.)

**Testimony of Captain William Fisher, for Defendants.**

CAPTAIN WILLIAM FISHER, one of the defendants and called as witness on the part of the defendants, having been first duly sworn on oath testified as follows:

My name is William Fisher. My official title is United States Supervising Inspector Steamboat Inspection Service, Department of Commerce, Eleventh District. I have held that position for over three years and still [105] hold it. I heard the reference heretofore made in this case to an investigation held by the local board of Inspectors and to the findings and a decision made by that Board. I first knew of these findings and decision when they were submitted to me in the usual way on April 18, 1921. The findings and decision are the same as set out in Exhibit "A" of the bill of



(Testimony of Captain William Fisher.)

complaint in this case. Upon receiving the findings and decision of the Local Board I immediately began a very thorough study of it, reviewing it over and over a great many times as a whole and in detail and continued reading, analyzing, studying and reviewing these findings and decision over a period of about two weeks. I completed my consideration and analysis of the findings and decision about the end of April or very early in May, the first or second of May. I have a copy of a telegram I sent to the Bureau on the 14th of May.

(Witness produces paper.)

Mr. COSGROVE.—I object to the introduction of any telegram or any further evidence as to what he did, prior to May 17th. The statute provides that upon a review the delinquent is entitled to be represented by counsel, and he never gave any notice prior to May 17th. What he did before is without any connection with this case.

Mr. MILVERTON.—I want to show what Captain Fisher did within the thirty days, showing compliance with the statute. What he did afterwards, may it please [106] the Court, was pursuant to another section of the statute—the calling of witnesses—of which Captain Alwen had notice.

THEREUPON, after further discussion, the telegram of May 14, 1921, was identified by the witness, marked Defendant's Exhibit "A" and introduced in evidence over the objection of counsel

(Testimony of Captain William Fisher.)

for the plaintiff, and the witness proceeded as follows:

After a thorough review of the testimony adduced by the local inspectors in their investigation of the collision, I concluded that their decision exonerating Captain Alwen was not warranted by the evidence before them. Nothing could be gained by returning the evidence to the local inspectors or advising them that I considered that Captain Alwen had not performed his duties, because they had already considered the evidence. Although my review of the testimony convinced me that Captain Alwen was culpable in his management of the "West Hartland," I desired to afford him an opportunity to testify in his own behalf, and in order to proceed in a definite way I decided to present the matter in the form of charges, which are the ones that appear as Plaintiff's Exhibit "B." In that way, that would permit Captain Alwen to question witnesses that I summoned and permit him to summon witnesses and be assisted by counsel, and enable him to prepare his own defense. I prepared a rough draft of the charges which are set out in the complaint as Exhibit "B" on the 14th of May. Then I decided to verify my [107] understanding of the statutes in regard to authority to prefer charges after my reviewing, in addition to my review, and therefore I wired to the Bureau on the 14th of May and received a wire to my telegram on the morning of the 16th and the Bureau advised me that I did

(Testimony of Captain William Fisher.)

have authority to prefer the charges and conduct a trial, so I then had the charges typewritten and deposited them in the mail. This was done on the 16th of May about 5 o'clock. They were addressed to Captain John Alwen. In response to these charges Captain Alwen appeared before me. My recollection is that the hearing commenced on May 20th and continued until July 22d. The taking of testimony was completed on July 22d, and Mr. Reagan, counsel for Captain Alwen, requested a further delay in order to file a brief. Upon receipt of his brief I concluded my study of the testimony and his brief and rendered the decision. I account for the long period of time for the hearing because it was postponed from time to time—sometimes at my request and sometimes at the request of Mr. Reagan. After the evidence was in Mr. Reagan made a motion to dismiss the proceedings, alleging lack of jurisdiction on my part. My recollection is that this objection was made on the 20th of June.

THEREUPON counsel for the defendants offered in evidence a copy of the objections made by counsel for Captain Alwen at the hearing before Captain Fisher on June 21, 1921. This instrument was admitted in evidence without objection and marked Defendants' Exhibit "B."

[108]

Thereafter the witness, Captain William Fisher, continued as follows:

(Testimony of Captain William Fisher.)

During the hearing before me I notified Captain Alwen that in that hearing I was proceeding as a continuance of the review that I had undertaken of the decision of the Local Inspectors. My recollection is that I made that statement in June. June 24th is the first time that I stated that it was a continuance of my review or a part of the review.

THEREUPON counsel for the defendants introduced in evidence an extract of the record of the hearing before Captain Fisher which was marked Defendants' Exhibit "C."

THEREUPON the witness, Captain William Fisher, continued as follows:

Exhibits "B" and "C," which have just been introduced in evidence, are copies of the record of the proceedings had before me. I arrived at my final findings and conclusions and decision sometime in the latter part of July. I immediately served a copy of my findings, conclusions and decision on Captain Alwen. Captain Alwen appealed from my decision to the Supervising Inspector General. I made the reading of the testimony taken at the investigation before the Local Board early in April. I have been connected with ships and shipping all my life. I have been connected with the Steamboat Inspection Service for nine years. [109]

Q. Do you know, captain, whether a man who is qualified as a master ordinarily would be qualified to hold any other position?



(Testimony of Captain William Fisher.)

Mr. COSGROVE.—I object, if the Court please.

Q. (Continuing.) In connection with ships or shipping? A. Yes, sir.

The COURT.—Sustained.

Mr. MILVERTON.—There is a statement here that he could not do anything else except act as master.

The COURT.—Oh, that is immaterial. We are not concerned about that.

Q. (Mr. MILVERTON.) Have you any knowledge of any suspension of the license of Captain Alwen prior to this particular suspension?

Mr. COSGROVE.—I object to that, if the Court please.

A. Yes, sir.

The COURT.—Sustained.

Mr. COSGROVE.—There is a paragraph in defendants' answer which I wish to have stricken as scandalous.

The COURT.—It may be stricken.

Mr. COSGROVE.—It covers that particular matter, that is, that portion of paragraph four.

The COURT.—Yes, that part is entirely immaterial and improper there.

Mr. COSGROVE.—Beg pardon?

The COURT.—I say that is entirely immaterial and it is improperly there. This man cannot, of course, be convicted here on a prior suspension, which already evidently had been served.

Mr. MILVERTON.—It was brought out in the answer by reason of the fact that they alleged he



never had been suspended before; that brought out that denial. [110]

Mr. COSGROVE.—With the exception of three months.

(No cross-examination. Witness excused.)

THEREUPON counsel for the defendants offered in evidence a certified copy of the report of the Committee on Merchant Marine and Fisheries of the House of Representatives, which was marked Defendants' Exhibit "D" for identification.

Thereafter there was introduced in evidence a certified copy of the decision of the Inspector General, upon the appeal of Captain Alwen, said exhibit being marked Defendants' Exhibit "E."

THEREUPON the evidence was closed.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922, and filed Jan. 15, 1923, as settled and approved. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [111]

United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District of Steamboat Inspec-  
tion Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of  
Commerce of the United States,

Defendants.

**Praeceptum for Transcript of Record.**

To F. M. Harshberger, Clerk of the Above-entitled  
Court:

Kindly prepare, certify and transmit to the  
Clerk of the Circuit Court of Appeals for the Ninth  
Circuit at San Francisco, California, a typewritten  
transcript of the record on appeal in the above-  
entitled cause, containing the following portions  
of the record in the above-entitled cause, to wit:

1. Complaint.
2. Answer of defendants.
3. Amended complaint.
4. Order allowing amendment to complaint.
5. Stipulation allowing defendants' time to an-  
swer amended complaint.

6. Answer of defendants to amended complaint.  
[112]
7. Decision.
8. Decree.
9. Assignments of error.
10. Exceptions.
11. Petition for appeal.
12. Order allowing appeal.
13. Original citation.
14. Order directing forwarding of original exhibits to Circuit Court of Appeals.
15. Order extending time for filing statement of evidence to November 1, 1922.
16. Order extending time for filing statement of evidence until November 29, 1922.
17. Order extending time for filing statement of evidence until December 28, 1922.
18. Notice of filing of statement of evidence.
19. Statement of evidence.
20. Order approving statement of evidence.
21. Praecept.

THOMAS P. REVELLE,  
United States Attorney.

DE WOLFE EMORY,  
Special Assistant United States Attorney.

Received a copy of the within praecipe this 10th day of January, 1922.

HOWARD G. COSGROVE,  
Attorney for Pltf.

[Endorsed]: Filed in the United States District Court, Western District of Washington,

Northern Division. Dec. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [113]

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In the United States District Court for the Western District of Washington, Northern Division.

No. 276-E.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for the Eleventh District, Steamboat Inspection Service, Department of Commerce of the United States, DONALD AMES and HARRY C. LORD, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 113, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by *praecepe* of coun-

sel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellants for making [114] record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 328 folios at 15¢ .....	\$49.20
Certificate of Clerk to transcript of record, 4 folios at 15¢ .....	.60
Seal to said certificate .....	.20
Certificate of Clerk to transcript of record, 3 folios at 15¢ .....	.45
Seal to said certificate .....	.20

I hereby certify that the above costs for preparing and certifying record, amounting to \$50.65, will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending March 31, 1923, as constructive earnings.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 22d day of January, 1923.

[Seal] F. M. HARSHBERGER,  
Clerk of the United States District Court, Western  
District of Washington. [115]

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United States District Court, Western District of  
Washington, Northern Division.

No. 276-E—IN EQUITY.

JOHN ALWEN,

Plaintiff,

vs.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the  
United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Defendants.

**Citation.**

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, Steamboat Inspection  
Service, Department of Commerce of the  
United States.

DONALD AMES and HARRY C. LORD, Local  
Inspectors, Steamboat Inspection Service, De-  
partment of Commerce of the United States.

To John Alwen and Howard G. Cosgrove, His Attorney, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein William Fisher, Supervising Inspector for the Eleventh District, of Steamboat Inspection Service, Department of Commerce of the United States, and Donald Ames and Harry C. Lord, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States, are the appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf. [116]

WITNESS, the Honorable JEREMIAH NETERER, Judge of the United States District Court of the Western District of Washington, Northern Division, this 28th day of December, 1922.

JEREMIAH NETERER,  
Judge. [117]

[Endorsed]: No. 276-E. In the District Court of the United States for the Western District of Washington, Northern Division. John Alwen vs. William Fisher et al. Citation. Filed in the United States District Court, Western District of Wash-

ington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

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[Endorsed]: No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. William Fisher, Supervising Inspector for the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, and Donald Ames and Harry C. Lord, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States, Appellants, vs. John Alwen, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 24, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the United States Circuit Court of Appeals in  
and for the Ninth Circuit.

IN EQUITY.—No. —.

WILLIAM FISHER, Supervising Inspector for  
the Eleventh District, of Steamboat Inspection  
Service, Department of Commerce of  
the United States, DONALD AMES and  
HARRY C. LORD, Local Inspectors Steam-  
boat Inspection Service, Department of Com-  
merce of the United States,

Appellants,

vs.

JOHN ALWEN,

Appellee.

**Additional Assignments of Error.**

Come now the appellants above named, by and  
through their attorneys, Thomas P. Revell and  
Dewolfe Emory, and respectfully submit the follow-  
ing assignments of error additional to those here-  
tofore filed herein, upon which they rely as support-  
ing their appeal from the judgment and decree  
entered on the 21st day of February, 1922, in said  
cause in the District Court of the United States  
for the Northern Division of the Western District  
of Washington, and under which assignments of  
error said appellants seek reversal of the decision,  
judgment and decree of said trial court:

VI.

That the District Court erred in decreeing that

the findings, decision and order of the Appellant William Fisher as Supervising Inspector, and the decision and order of the Supervising General affirming the said Appellant William Fisher's said findings, decision and order, are null and void.

#### VII.

That the District Court erred in perpetually enjoining the said William Fisher as Supervising Inspector from filing with said Local Board his findings, decision and order, or either or any of them, or any decision or order, or any findings, decision or order in any wise reversing, changing or modifying the findings and decision of the said Local Board as to the appellee herein or his license, or from doing anything tending to reverse, modify or change said decision and order of said Local Board as to the said appellee or his said license in the said proceedings.

#### VIII.

That the District Court erred in perpetually enjoining the Appellants Donald Ames and Harry C. Lord as members of the Local Board, from placing on file with the records of said Local Board or from complying with, recognizing or receiving any findings, decision or order of the said William Fisher as Supervising Inspector, or from the said Supervising Inspector or anyone else tending to modify, change or reverse their said decision as such Local Board as to the appellee herein, and from cancelling or suspending the license of the said appellee on account of his actions or conduct



immediately preceding, at, or immediately following the collision.

IX.

That the District Court erred in entering its decree herein in favor of the appellee and against the appellants, for the reason that said decree is not supported or sustained by the testimony adduced at the trial of this cause and the statement of evidence herein.

X.

That the District Court erred in failing to dismiss the bill of complaint herein.

THOS. P. REVELLE,

United States Attorney,

DE WOLFE EMORY,

Assistant United States Attorney,

Attorneys for Appellants.

[Endorsed]: No. 3975. In the United States Circuit Court of Appeals for the Ninth Circuit. William Fisher et al., Appellants, vs. John Alwen, Appellee. Additional Assignments of Error. Filed Pursuant to Order of Court Entered Feb. 15, 1923. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 1.**

**DEPARTMENT OF COMMERCE.**

Steamboat-Inspection Service.

In Reply Refer to  
File No. 788/1.

Office of Supervising Inspector, 11th District,  
Seattle, Wash.

May 16, 1921.

Captain John Alwen,  
2023 Boylston Ave. North,  
Seattle, Washington.

Sir:—

You are hereby charged with violation of the U. S. Revised Statutes, sections 4439 and 4450, with negligence, unskillfulness and inattention to your duties as master of the steamship WEST HARTLAND on the night of March 31, 1921, and

1. the morning of April 1, 1921, in this, that being in doubt as to the course and intention of the steamship GOVERNOR as that vessel and the WEST HARTLAND were approaching each other, you failed to signify your lack of understanding, which resulted in the collision between the WEST HARTLAND and the GOVERNOR; and
2. further, in this, that having signaled the GOVERNOR of your intention to hold course and speed you failed to do so but without informing the GOVERNOR thereof you stopped and reversed engines, which resulted in the collision between the

WEST HARTLAND and the GOVERNOR;  
3. and further, in this, that when the collision was imminent you did not take proper measures to avoid the collision which resulted in the collision between the WEST HARTLAND and the GOVERNOR.

At your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire.

Respectfully,

WILLIAM FISHER,

Supervising Inspector, Eleventh District.

[Endorsed] : Case No. 276-E. Plaintiffs' Exhibit 1. United States District Court, Western Dist. of Washington. John Alwen vs. William Fisher etc. Filed Jan. 10, 1922. ———, Clerk.

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

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**Defendants' Exhibit "A."**

[TELEGRAM.]

Seattle, May 14, 1921.

Uhler

Supervising Inspector General

Steamboat Inspection Service

Washington

My investigation satisfies me that charges should be filed against master West Hartland who was exonerated in investigation of Local Board Have

I power to file charges direct and proceed to try case or should I order Local Board to file charges  
Thirty days expires sixteenth

WILLIAM FISHER

Official business

Charge Steamboat Inspection Service  
Washington, D. C.

[Endorsed]: Case No. 276-E. Defts. Exhibit "A." United States District Court, Western Dist. of Washington. John Alwen vs. William Fisher et al. Filed Jan. 10, 1922. ———, Clerk.

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

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**Defendants' Exhibit "B."**

Hearing resumed June 21, 1921. Reported by H. C. SODERMAN.

Mr. MacCORMAC SNOW, Attorney, United States Shipping Board, Portland, Oregon, present at hearing, and assisting Mr. REAGAN.

Mr. REAGAN.—We move to dismiss the charges as filed by the Supervising Inspector as they appear in the record in this case on the ground and for the reason that nowhere in the Statutes of the United States or in the Regulations issued by the Board of Supervising Inspectors, approved by the Secretary of Commerce is the power or authority given to the Supervising Inspector to hear charges as he has attempted to do in this case. This motion is based upon Sections 4407 and 4406, Revised Stat-

utes of the United States, as they appear in the Bulletin of the Department of Commerce, Steamboat Inspection Service, entitled Laws Governing the Steamboat-Inspection Service, Edition July 21, 1920. Section 4407, which provides, "Whenever a supervising inspector ascertains to his satisfaction that any master, mate, engineer, pilot, or owner of any steam vessel fails to perform his duties according to the provisions of this Title, he shall report the facts in writing to the board of local inspectors in the district where the vessel was inspected or belongs; and, if need be, he shall cause the negligent or offending party to be prosecuted; and if the supervising inspector has good reason to believe there has been, through negligence or any other cause, a failure of the board which inspected the vessel to do its duty, he shall report the facts in writing to the Secretary of Commerce; who shall cause immediate investigation into the truth of the complaint, and, if he deems the cause sufficient, shall remove any officer found delinquent." This section is the only section in the Revised Statutes which gives the right even to prefer charges to the Supervising Inspector, and in exact terms states how that is to be done, by filing them in writing with the Local Inspectors. Section 4450 of the Revised Statutes of the United States, the only statute in the Statutes of the United States provides that the "Local Board of Inspectors shall investigate all acts of incompetency or misconduct committed by any licensed officer while acting under the authority of his license, and shall have power to summon before



them any witnesses within their respective districts and compel their attendance by a similar process as in the United States circuit or district courts; and they may administer all necessary oaths to any witnesses thus summoned before them; and after reasonable notice in writing, given to the alleged delinquent, of the time and place of such investigation, such witness shall be examined, under oath, touching the performance of his duties by any such licensed officer; and if the Board shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence or unskillfulness, or has endangered life, or willfully violated any provision of this Title, they shall immediately suspend or revoke his license.” The act of June 10, 1918, which repeals Sec. 4452, Revised Statutes, provides that, “Whenever any person directly interested in or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any decision or action of a supervising inspector to the Supervising Inspector General whose decision when approved by the Secretary of Commerce, shall be final: Provided, however, That application for such re-examination of the case by a supervising inspector *of* by the Supervising Inspector General shall be made within thirty days after the decision or action appealed from shall have been rendered or taken; And provided further, That in all cases reviewed under the provisions of this Act where the

issue is the suspension or revocation of the license of a licensed officer such officer shall be allowed to be represented by counsel and to testify in his own behalf." Section 2 of that same act provides "That whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision they shall report the case to the supervising inspector of the district, who shall investigate and decide the same. Any supervising inspector may within thirty days thereafter, upon his own motion, review any decision or action of any board of local inspectors within his district and in like manner the Supervising Inspector General may within thirty days thereafter review any decision or action of any supervising inspector or board of local inspectors, and the decision of the Supervising Inspector General in such case shall, when approved by the Secretary of Commerce, be final." Sec. 3, "That any decision or action reviewed by the Supervising Inspector General or by any supervising inspector, as provided in sections one and two of this Act, may be revoked, changed, or modified by such reviewing officer, who shall have power to administer oaths and to summon and compel the attendance of witnesses by a similar process as in the district courts of the United States; and the disbursing clerk, etc." Sec. 4, "That the Secretary of Commerce shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this Act." At this time I desire to call the supervising inspector's attention to this provision, the only statutory provision to be found in

the Statutes of the United States, regarding the hearing of charges against a licensed officer. The power of supervision is given to the Supervising Inspector by Sec. 4407, with the right, if the investigation shows that there has been inattention, neglect or failure to perform his duties by a licensed officer, to file said charges with the local board of Inspectors for hearing. Sec. 4450, provides "That the Local Board of Inspectors shall hear all (the word all being used in the Statute) charges for all acts of incompetency or misconduct committed by any licensed officer." The act of June 10, 1918, has 3 provisions; the first provision is—giving any person directly interested in or affected by any decision of the board of local inspectors the right to appeal therefrom to the supervising inspector, and the like right to appeal from the supervising Inspector to the Supervising Inspector General. It provides that this appeal must be taken within 30 days from the date of the decision; the second provision therein is that when a local board disagrees the matter is then referred to the supervising inspector for the district, with the proviso that he shall investigate the same. It also provides that any supervising inspector within 30 days thereafter, "meaning 30 days" after the disagreement and 30 days after the matter has been referred to him by the local inspectors, may upon his own motion review this decision of the local inspectors, that also provides that it must be done within 30 days. Sec. 3 gives such reviewing officer the power to administer oaths, etc. Sec. 4, "That the Secretary

of Commerce shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this Act." Sec. 4405 of the Revised Statutes provides, "The Supervising Inspectors and the Supervising Inspector General shall assemble as a board once in each year at the city of Washington, D. C., on the third Wednesday in January and at such other times as the Secretary of Commerce shall prescribe, for joint consultation, and, among other provisos that the Board is to establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and also regulations, prohibiting useless and unnecessary, etc." And then the provision is that "The Secretary of Commerce may at any time call in session, after reasonable public notice, a meeting of an executive committee, to be composed of the Supervising Inspector General and any two Supervising Inspectors, which committee with the approval of the said Secretary, shall have power to alter, amend, add to, or repeal any of the rules and regulations made, with the approval of the Secretary of Commerce, by the board of supervising inspectors, either by virtue of this section or under any power granted by this title, or any amendments thereof, such alteration, amendment, addition, or repeal, when approved by the said Secretary, to have the force of law and to continue in effect until thirty days after the adjournment of the next meeting of the Board of Supervising Inspectors." The bulletin of the Department of Commerce, Steamboat Inspection



Service, General Rules and Regulations, prescribed by the Board of Supervising Inspectors, as amended at Board meeting of January, 1920 (Edition May 14, 1920, which is approved by an Act on May 14, 1920), by J. W. Alexander, Secretary of Commerce, provides on Page 183, rules of practice for the government of Supervising and Local Inspectors of steam vessels in trials of licensed officers of vessels. It is divided into two sections. The first section is the suspension and revocation of licenses. It deals with charges by the Local Inspectors, testimony and findings. Nowhere in the first subdivision, or the first 10 paragraphs of Chapter 1 of the said Rules of practice, is the Supervising Inspector given any power. Chapter 2, of said Rules of Practice, or that part entitled Appeal to Supervising Inspectors, containing 4 paragraphs, gives to the Supervising Inspector upon notice of appeal from the decision of the Local Board, providing said notice of appeal shall have been made within 30 days of the date of decision of the Local Board, shall give notice in writing to said Local Board to forward a certified copy of their decision together with the charges and all evidence in writing on file in their office. Sec. 2 provides that "The Supervising Inspector shall then proceed to investigate the case under the same rules prescribed for the trial of the accused by the local Board. Sec. 3 provided, "The testimony taken before the Local Board may be considered by the Supervising Inspector for the purpose of determining whether the finding of the Local Board



is justified by the evidence, and he shall have power to remand the same for explanation or correction." These are the rules governing Supervising Inspectors as laid down by the Revised Statutes. And the General Rules and Regulations of the Department of Commerce are approved by the Secretary of Commerce and issued by the Department of Commerce. The facts in the case of Capt. Alwen are these: The collision between the "West Hartland" and the "Governor" occurred on the morning of April 1st. On April 1st, at 1:30 P. M. he was summoned to appear before the Board of Local Inspectors for investigation as to the cause of this collision. He appeared and was in attendance upon said inspectors until the hearing was finished: that on April 16th the local board of steamboat inspectors handed down their decision in which they find, among other things, that "when the master of the 'West Hartland,' Captain John Alwen, who had personal charge of the navigation of the vessel at the time, first saw the approaching lights of the 'Governor' he realized that the vessels were developing a crossing situation. He watched the approaching lights anxiously but abided by the provisions of the crossing rule. Crossing Rule VII quoted. When two steamers are meeting at right angles or obliquely, viz.: the vessel having another on her starboard side must give way to the other, the latter to hold her own course and speed. This makes the latter vessel a privileged vessel under the law, as the vessel having the right of way must keep her course and speed, and the other

vessel may assume that she will do so. This renders it obligatory on the vessel which has the right of way to pursue her course at the speed she had been keeping up previously. She must rely on the other vessel to avoid collision, and not embarrass her by any maneuver. All she need do is do nothing. Then the other vessel knows what to expect and navigates accordingly. This rule applies to all the other steering and sailing rules. Under it, when a sail vessel is running free keeps out of the way, the close hauled vessel keeps her course. Between two crossing steamers, when the one on the left keeps out of the way the other keeps her course. Between a steamer and a sail vessel, when the steamer keeps out of the way, the sail vessel keeps her course. The principle is the same in all these different contingencies. See 155, U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. This rule the 'West Hartland' was endeavoring to follow until the master saw that a collision was imminent when he reversed his engines to full speed astern in an effort to lessen the force of the impact that must follow, a privilege granted him under Rule XI of the inland pilot rules, which reads as follows: 'In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.' The expression 'if necessary' does not mean essential but prudent or expedient to the mind of a mariner of skill. As Capt. John Alwen, master of the S. S. 'West Hart-

land' acted in accordance with these principles, he is absolved from all blame." The record in this case in the office of the Board of Local Inspectors, does not show that any appeal was ever taken from this decision. The language of this decision shows that the very same matters were considered by the Board of Local Inspectors as the Supervising Inspector is attempting now to hear here, as will be seen from comparison of the language of the decision of the Local Inspectors and the charges as served upon Capt. Alwen by the Supervising Inspector of the 11th District. (Reads charge.)

DEPARTMENT OF COMMERCE.

Steamboat Inspection Service.

In reply refer to  
File No. 788/1.

Office of Supervising Inspector, 11th Dist.  
Seattle, Wash.

May 16, 1921.

Captain John Alwen,  
2023 Boylston Ave. North.,  
Seattle, Washington.

Sir: You are hereby charged with violation of the U. S. Revised Statutes, Sections 4439 and 4050, with negligence, unskillfulness and inattention to your duties as Master of the steamship WEST HARTLAND on the night of March 31, 1921, and the morning of April 1, 1921, in this, that being in doubt as to the course and intention of the steamship GOVERNOR as that vessel and the WEST HARTLAND were approaching each other, you

failed to signify your lack of understanding, which resulted in the collision between the WEST HARTLAND and the GOVERNOR; and further, in this, that having signaled the GOVERNOR of your intention to hold your course and speed you failed to do so but without informing the GOVERNOR thereof you stopped and reversed engines, which resulted in the collision between the WEST HARTLAND and the GOVERNOR; and further, in this, that when the collision was imminent you did not take proper measures to avoid the collision which resulted in the collision between the WEST HARTLAND and the GOVERNOR.

At your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire.

Respectfully,

(Signed) WILLIAM FISHER,

Supervising Inspector, Eleventh District.

W.

Mr. REAGAN.—In the decision of the Local Inspectors they find that the captain of the “West Hartland” when he first saw the approaching lights of the “Governor” realized that they were in a crossing situation. The first charge in this, is “being in doubt as to the course and intention of the steamer GOVERNOR as that vessel and the WEST HARTLAND were approaching each other, you failed to signify your lack of understanding.” The Local Inspectors find that under Rule VII, in such a situation it was his duty, in the language



of the Local Inspectors "to do nothing." The second charge here is "that having signaled the 'Governor' your intention to hold your course and speed you failed to do so, but without informing the 'Governor' you stopped and reversed engines." The Local Inspectors had this matter before them as shown by the decision which reads (referring to her being a privileged vessel she was entitled to keep her course and speed) "This rule the 'West Hartland' was endeavoring to follow until the master saw that a collision was imminent when he reversed his engines to full speed astern, in an effort to lessen the force of the impact that must follow, a privilege granted him under Rule XI of the inland pilot rules." The third charge as laid here is "that when the collision was imminent you did not take proper measures to avoid the collision which resulted in the collision between the 'West Hartland' and the 'Governor.' The Local Inspectors in their decision, after quoting Rule XI, pilot rules, say "the expression 'if necessary' as used there does not mean essential, but prudent or expedient, to the mind of a mariner of skill. As Capt. John Alwen, master of the S. S. 'West Hartland' acted in accordance with these principles, he is absolved from all blame." So I say to you that comparison of the language of the decision of the Board of Local Inspectors and the charges as handed to Captain Alwen in this case, shows that the Board of Local Inspectors had the identical questions before them and passed upon them. That the only provision made under



such circumstances is an appeal to you. That there has been no appeal taken either by any person interested, or by you as Supervising Inspector in your official capacity. So I have no hesitancy in saying to you that these charges and this hearing is being held without authority or warrant of law. This provision under the Regulations, provides (and it is the only regulation that I have been able to find), that the Supervising Inspector shall give notice in writing to said Local Inspectors to forward a certified copy of their decision together with the charges and all evidence in writing on file in their office. The records so far show, as far as we know, that this provision of the Regulations was never complied with, which under Sec. 4405 of the Revised Statutes, has the same force and effect as the Statutes. I want to assure the Supervising Inspector that this motion is not made for any other purpose than protecting the license of Capt. Alwen as his right to a livelihood. These statements are not in the nature of an appeal, but the only rights given anyone are those contained in the Statutes, and unless that right is found in the Statutes then the Secretary of Commerce down to the Local Inspectors has no right to act in this case. In this connection I might say that I desire to call the Supervising Inspector's attention to the case of *Bulger vs. Benson* decision in 262 Federal Reporter 929, which was a case in which the Board of Local Inspectors attempted to read in the Statutes something that was not there. The Supervising Inspector took the same stand.

The case was tried in the District Court and was decided in favor of the licensed officer; that the Inspectors' only authority to act is in the Statutes and that they were wrong, and an injunction was granted against them taking away his license. This case was appealed by the Inspectors and affirmed by the Circuit Court of Appeals of this District. I can see no distinction between the 2 cases. For the reason I would like to have a decision upon this motion before proceeding further.

SUPERVISING INSPECTOR.—Mr. Reagan, I will ask you if the question involved in the motion for dismissal is on the point of lack of authority of this office to conduct this trial?

Mr. REAGAN.—Absolutely, no authority, no provision in the Statutes, boiling it down, no statutory provision gives to you as Supervising Inspector the right in the manner you are doing it, to summon witnesses in this case.

SUPERVISING INSPECTOR.—In answer to the motion for dismissal I will say that the question of authority of this office to file charges against Captain Alwen in this case, and proceed to trial, has been passed upon by the Bureau, Steamboat Inspection Service, and the Bureau did rule that this office has authority to file charges against Capt. Alwen, and by reason of that decision from the Bureau the proposal to dismiss the trial is denied. This office is willing to hear any testimony that the defense has to offer.

Mr. REAGAN.—I further desire to call your attention to the fact that the charges as laid by the Supervising Inspector in the instant case allege the violation of Section 4450, which specifically states that “The Local Board of Inspectors shall investigate all acts of incompetency of misconduct on the part of any licensed officer.” The acts of misconduct and incompetency as alleged in these charges are shown by the record in the office of the Supervising Inspector have never been considered by the Local Board of Inspectors. In hearing held upon which decision was rendered April 16, 1921, no appeal was taken by an interested party or party affected by said decision, or was any order or motion made by the Supervising Inspector within 30 days of said hearing to review that decision, and as far as Captain Alwen, the master of the “West Hartland” has been advised, no action of any kind was taken by the Supervising Inspector in regard to the decision as filed by the Board of Local Inspectors.

SUPERVISING INSPECTOR.—I will say that no charges were filed against Capt. Alwen by the Local Inspectors. The Local Inspectors merely held an investigation of the collision, and this office filed charges against Capt. Alwen within 30 days of the date of the decision of the Local Inspectors as a result of the investigation of the collision.

Mr. REAGAN.—Did you report any facts you found in writing to the Local Board?

SUPERVISING INSPECTOR.—I don't think, Mr. Reagan, that I am called upon to answer the cross-examination.

Mr. REAGAN.—In view of the answer to this motion of Captain Fisher, the Supervising Inspector, and his statement that no charges were filed by the Board of Local Inspectors, I desire to call attention to Sec. 4407, which provides that "Whenever a Supervising Inspector ascertains to his satisfaction that any master, mate, engineer, pilot, or owner of any steam vessel fails to perform his duties according to the provisions of this Title, he shall report the facts in writing to the board of local inspectors in the district where the vessel was inspected or belongs and, if need be, he shall cause the negligent or offending party to be prosecuted; and if the supervising inspector has good reason to believe there has been, through negligence or any other cause, a failure of the board which inspected the vessel to do its duty, he shall report the facts in writing to the Secretary of Commerce, who shall cause immediate investigation in to the truth of the complaint, and, if he deems the cause sufficient, shall remove any officer found delinquent." *Ut* appears from the statement of the Supervising Inspector that at no time did he report in writing to the Board of Local Inspectors of this District any failure on the part of Captain Alwen to perform his duties, and further appearing that he has not reported the facts in writing to the Secretary of Commerce that the Local Board of Inspectors has failed in their duty,



and it further appearing that the Supervising Inspector of this District has failed, by his own statement just made, to present his alleged neglect of duty of Capt. Alwen before the Board of Local Inspectors, that from his statement alone it is plain—that the Statutory requirements of the Congress of the United States have in no way been carried out or even attempted to be carried out, and therefore this hearing is being held without authority.

**SUPERVISING INSPECTOR.**—In reply I will state that Sec. 4407 Revised Statutes, deals more particularly with the inspection of vessels. I will add that on conclusion of this trial I will be in a position to act in conformity with the Statutes.

**Mr. REAGAN.**—I will state that that is the only section that gives the Supervising Inspector any authority in regard to inattention to duty of a licensed officer, specifically to “inattention,” in the language of the Statute “failure to perform duty,” according to the provision of this Title then the Supervising Inspector shall report the facts in writing to the Board of Local Inspectors, which was never done. My objection is that the statute, the entire statute, under the laws governing the Steamboat Inspection Service, states that the duty of initiating charges is placed solely and alone with the Local Board of Inspectors, and that it is his duty to file charges, as it comes to the knowledge of the Supervising Inspector that a licensed officer is guilty of neglect of duty, to file the same with the Local Inspectors.



SUPERVISING INSPECTOR.—I will say that the matter of authority of this office in this proceeding has been passed upon and I am ready to resume this case and listen to any testimony the defense wants to present.

[Endorsed]: Case No. 276-E. Defts. Exhibit "B." United States District Court, Western District of Washington. John Alwen vs. William Fisher etc. Filed Jan. 10, 1922. ———, Clerk.

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

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### **Defendants' Exhibit "C."**

Hearing resumed June 24, 1921. (Reported by M. H. THOMAS.)

(Statement by the Supervising Inspector.)

In further reference to the objection which was interposed to my instituting these proceedings, I desire to state at this time that the Board of Local Inspectors held an investigation of the collision between the steamships GOVERNOR and WEST HARTLAND, at the conclusion of which, on April 16, 1921, they rendered a decision exonerating Captain John Alwen of the WEST HARTLAND. Pursuant to the Act of 1918, I carefully reviewed their proceedings and concluded that the facts brought out did not warrant the conclusion which they reached as to Captain Alwen, and re-

quired further investigation on my part, consequently, on May 16, 1921, in accordance with my duties as Supervising Inspector, I preferred charges and under these charges have conducted this hearing as a part of my review of the case. Under section 3 of the Act of 1918, I have the authority as a reviewing officer to summon witnesses and hear their testimony the same as in an original proceeding.

Mr. REAGAN.—I would like to state that in renewing the objection, in view of the statement of the Supervising Inspector, that nowhere in the Statutes or laws of the United States, or Regulations of the Department of Commerce, Steamboat Inspection Service, is there found any authority on the part of the Supervising Inspector to file charges in an original proceeding such as has been done in this case. That that duty, under section 4450 of the Revised Statutes displays solely and entirely in the hands of the Local Board of Steamboat Inspectors. Under section 4407 the Supervising Inspector is given authority to report any facts of failure to perform the duties of a licensed officer to the Board of Local Inspectors for investigation, which was not done in this case. Under the Acts of June 10, 1918, nowhere provides that the Supervising Inspector can and none of the provisions authorizes him to file original charges against a licensed officer such as was done in this case. It simply provides that he has the authority to review and can revoke charge or modify, and that he has the power to administer oaths held

in the attendance of witnesses in the review that he has stated—today is the result of the original investigation introduced by the Local Inspectors out of which no charges arose. That under this section it was his duty if he found that the Local Inspectors were wrong to remand the case back to them for rehearing. Also the rules of practice for the government of the Supervising Inspectors and Local Inspectors for Steam Vessels, in trial of licensed officers of vessels, which was issued May 14, 1920, by the Department of Commerce under the authority of J. W. Alexander, Secretary of Commerce, which is nearly two years after the Act of June 10, 1918, does not provide for the filing of original charges by the Supervising Inspector, but places that duty entirely, as does the Statutes, in the Local Board of Inspectors. It does give the right of the Supervising Inspector to hear an appeal upon notice provided said notice of appeal shall be made within thirty days from the date of the Local Board, and shall give notice in writing to said Local Board to forward certified copy of their decision together with the charges and all evidence and writing on file in their office. That there is no evidence that any notice of appeal was ever given in by anyone. There is no evidence by the Local Inspectors ever notified for for a certified copy of their decision together with the charges and all evidence and writing in file in their office. This section 3 of the Rules of practice as promulgated by the department of Commerce provides that testimony taken before the Local Board may

be considered by the Supervising Inspector for the purpose of determining whether the findings of the Local Board is justified by the evidence, and he shall have the power to remand the same for explanation and correction. That under this statement just made by the Supervising Inspector, he examined that evidence on his own motion and it did not warrant the conclusion of the Local Inspectors. He did not remand it to the Board of Local Inspectors for either an explanation or correction, that his charges as filed upon Captain Alwen are being held without authority of law, and this statement is made by his counsel for the purpose of answering the Supervising Inspector's statement just read in to the record.

[Endorsed]: Case No. 276-E. Defts. Exhibit "C." United States District Court, Western Dist. of Washington. John Alwen vs. William Fisher, etc. Filed Jan. 10, 1922. ———, Clerk.

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

**Defendants' Exhibit "D."**

## SIXTY-SEVENTH CONGRESS

William S. Greene, Chairman	Arthur M. Free
George W. Edmonds	William H. Kirkpatrick
Frank D. Scott	Ogden L. Mills
Wallace H. White, Jr.	Rufus Hardy
Frederick R. Lehlbach	Ladislav Lazaro
Edwin D. Ricketts	William B. Bankhead
Carl R. Chindblom	Ewin L. Davis
Albert W. Jefferis	Thomas H. Cullen
Nathan D. Perlman	Schuyler O. Bland
Benjamin L. Rosenbloom	Clay Stone Briggs
Harry C. Gahn	René G. De Tonnancour, Clerk

## HOUSE OF REPRESENTATIVES U. S.

## Committee on

## The Merchant Marine and Fisheries

## Washington, D. C.

September 22, 1921.

Personally appeared before me on this 22d day of September, in the year 1921, Mr. Rene G. de Tonnancour, with whom I am acquainted and whom I hereby certify to be the Clerk of the Committee on the Merchant Marine and Fisheries, House of Representatives, in Washington, D. C.

I also certify that said Rene G. de Tonnancour affixed his signature under the certification which was written by his own hand in writing on the copy of Report No. 495 hereto attached.

Signed by me on this twenty-second day of September, in the year of our Lord Nineteen Hundred and Twenty-one.

[Seal]

HOWARD F. BRESEE,  
Notary Public.



[Endorsed]: Case #276-E. Defendants' Identification "D."

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

Sept. 22, 1921.

I hereby certify that this Report No. 495 is a true copy of the original submitted to the House of Representatives in Washington, D. C., by the Committee on the Merchant Marine & Fisheries on April 5, 1916, during the 1st session of the 64th Congress.

RENE G. de TONNANCOUR,  
Clerk to the Committee on the Merchant Marine  
and Fisheries.

#### HOUSE OF REPRESENTATIVES.

64th CONGRESS,  
1st Session.

REPORT  
No. 495.

#### APPEALS FROM DECISIONS OF BOARDS OF LOCAL INSPECTORS OF VESSELS.

April 5, 1916.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. SAUNDERS, from the Committee on the Merchant Marine and Fisheries, submitted the following:

#### REPORT.

[To accompany H. R. 13223.]

The committee on the Merchant Marine and Fisheries, to whom was submitted the following bill:

A BILL To provide for appeals from Decisions of boards of local inspectors of vessels, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whenever any person directly interested in or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any decision or action of a supervising inspector of the Supervising Inspector General, whose decision, when approved by the Secretary of Commerce, shall be final: Provided, however, That application for such re-examination of the case by a supervising inspector or by the Supervising Inspector General shall be made within thirty days after the decision, or action appealed from shall have been rendered or taken: And provided further, That in all cases reviewed under the provisions of this act where the issue is the suspension or revocation of the license of a licensed officer such officer shall be allowed to be represented by counsel and to testify in his own behalf.

Sec. 2. That whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision they shall report the case to the supervising inspector of the district, who shall investigate and decide the same; and any supervising inspector may within thirty days there-

after, upon his own motion, review any decision or action of any board of local inspectors within his district; and in like manner the Supervising Inspector General may within thirty days thereafter review any decision or action of any supervising inspector or board of local inspectors, and the decision of the Supervising Inspector General in such case shall, when approved by the Secretary of Commerce, be final.

Sec. 3. That any decision or action reviewed by the Supervising Inspector General, or by any supervising inspector, as provided in sections one and two of this act, may be revoked, changed, or modified by such reviewing officer, who shall have power to administer oaths, and to summon and compel the attendance of witnesses by a similar process as in the district courts of the United States; and the disbursing clerk, Department of Commerce, shall pay, on properly certified vouchers, such fees to any witness so summoned, for his actual travel and attendance, as shall be officially certified to by the officer reviewing the case, not exceeding the rate allowed for fees to witnesses for travel and attendance in the district courts of the United States.

Sec. 4. That the Secretary of Commerce shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this act.

Sec. 5. That section forty-four hundred and fifty-two of the Revised Statutes, as amended by

section six of the act of March third, nineteen hundred and five, is hereby repealed—

respectfully reports the same back to the House without amendment, with the recommendation that it do pass.

The reasons for the enactment of this measure may be found in certain facts ascertained in the investigation of the Eastland disaster at Chicago on July, 1915.

It developed in the course of that investigation that the action of the local inspectors was final under existing law, with relation to various situations vitally affecting the public interests. In connection with this investigation the Secretary of Commerce secured the aid of several prominent men in Chicago who acted as an advisory committee. At the conclusion of the hearing these gentlemen made a number of recommendations. One of these recommendations was to the effect that in all cases where the power of decision of the local inspectors was final under existing law, an appeal shall be provided for all the parties directly concerned. The primary purpose of this bill is to afford this appeal, the course of the same being from the local inspectors to the supervising inspector, and from the supervising inspector to the supervising inspector general. The provisions of this bill would allow an appeal to an officer convicted by the local inspectors of dereliction of duty, and in case of acquittal a like appeal is provided for the department.



Again, the local board of inspectors might make an entry in a certificate of inspection allowing the use of a less number of officers than the considerations of safe navigation for the vessel inspected would suggest as necessary and proper. Under these circumstances the owners of the vessel from motives of selfish personal interest might not take an appeal, but would be willing to abide by the action of the inspectors. This bill provides in such a case not only for a review on his motion by the supervising inspector of any action of the local inspectors, but affords in addition an appeal from the decision of the local board, to any person directly interested in, or affected by its decision. The reasons for the passage of this measure, are both obvious and impelling. Appended will be found the letter of the Secretary of Commerce to the chairman of this committee, with the accompanying documents.

DEPARTMENT OF COMMERCE,

Office of the Secretary,

Washington.

December 21, 1915.

My Dear Judge Alexander: I shall be glad if you will attach this letter to that which I have heretofore written you respecting H. R. 4783.

The enclosed is one of the regular accident reports made to me by the Steamboat-Inspection Service. Attached to it is a copy of the letter I have sent to the service in the matter. The penalty of 30 days' suspension of license for such violation of regulations as has resulted in this case in the



sinking of the steamer and the loss of two lives is absurdly inadequate. Nothing can be done about it, however, by the department. There is no appeal. I can write the letter of which copy is herein, but if the inspectors see fit they can do the same thing again. The suspension should have been for at least six months. It is wholly wrong that the Government should find its hands tied in matters of this kind, and it is subversive of the discipline which the service exists to preserve.

Yours, very truly,  
WILLIAM C. REDFIELD,  
Secretary.

Hon. J. W. ALEXANDER,  
House of Representatives, Washington, D. C.  
DEPARTMENT OF COMMERCE,  
Steamboat-Inspection Service,  
Washington,

December 8, 1915.

The Secretary of Commerce:

Pursuant to instruction, you will please find below report of accident in which a vessel subject to the inspection of this service was concerned:

Names of vessels: Towing steamers Lackawanna and Triton.

Line or owner: Delaware, Lackawanna & Western Railroad Co., New York, N. Y., and the Independent Pier Co., Philadelphia, Pa., owners, respectively.

Officers in charge of vessel: M. Brophy and Thomas O. Moon, masters, respectively.

Local district in which accident occurred: Boston.

Place of accident: Handkerchief Light Vessel.

Date of accident: August 15, 1915.

Nature and extent of accident: Collision, causing the towing steamer Lackawanna to sink.

Cause of accident: Violation of regulations governing tows of seagoing barges on inland waters.

Number of lives lost: Two.

Vessels were last inspected at Hoboken, N. J., and Philadelphia, Pa., respectively, on September 17, 1915, respectively, by C. Smith and H. McPherson, assistant inspectors of hulls, and W. G. Fenwick and C. A. Mattson, assistant inspectors of boilers.

Action taken: Case investigated and the licenses of the masters of both these vessels were suspended for a period of 30 days.

REMARKS.—The barge Nanticoke in tow of the tug Triton collided with the tugboat Lackawanna, causing the latter to sink soon after. The mate and the cook of the Lackawanna were drowned, and the remainder of the crew of the Lackawanna, 14 men, were rescued in their lifeboat.

This case was investigated by the local inspectors at Boston and charges were preferred against the masters of these vessels. M. Brophy, master of the Lackawanna, was tried and found guilty of violation governing tows of seagoing barges on inland waters and his license was suspended for 30 days. Thomas O. Moon, master of the tug Triton, failed to appear at his trial on the dates he was directed to do so, and upon his failure to appear the board convened for trial and entered a finding of guilty

by default and his license was suspended for 30 days, said suspension to begin on the date of the receipt of his license by the local inspectors.

The matter of the short period of the suspension of these men's licenses was taken up by this office with the local inspectors. The local inspectors advised that in arriving at the term of suspension they did not consider any extenuating circumstances, although certain conditions existed that might be considered extenuating.

GEO. UHLER.

December 21, 1915.

SUPERVISING      INSPECTOR      GENERAL,  
STEAMBOAT-INSPECTION SERVICE:

I am sending to the chairman of the House of Representatives Committee on Merchant Marine and Fisheries accident report 71663 of December 8, respecting the loss of the towing steamer Lackawanna, and with it goes a copy of this letter. I am using this example to urge the enactment of H. R. 4783, which would give the department the right of appeal from such absurd decisions as that in this present case. .

Here is a case in which it was admitted that the captain of a towing steamer so acted that a collision ensued causing the loss of the towing steamer Lackawanna with two lives. The penalty is a suspension of license for 30 days. It is hard for me to conceive the condition of mind in which so trifling a penalty is imposed for so serious an offense. The regulations intended to save life and property were broken and loss of life and

property both ensued. What worse offense is there that a marine captain could commit than this? It is not the absence of skill that is charged. It is not in the strictest sense an accident that is charged. It is a violation of regulations causing the death of human beings and the loss of a steamer. I should expect to see in a case of this kind an indefinite suspension of license or certainly one for a period of not less than six months. I deeply regret that the law seems such that charges cannot be brought against the local inspectors who impose this trivial penalty for neglect of duty.

I wish you to impress upon them that I regard them as having been derelict and as deserving of a severe reprimand. I trust in future cases they may show a higher sense of the value of human life and of the purpose for which they sit in judgment on violators who by such violations cause loss of life and property.

WILLIAM C. REDFIELD,  
Secretary.

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**Defendants' Exhibit "E."**

DEPARTMENT OF COMMERCE.

Washington.

September 21, 1921.

I hereby certify that the annexed is a true copy of the original decision of the Supervising Inspector General, Steamboat-Inspection Service, Department of Commerce, in the case of the appeal of Captain John Alwen, Master of the steamer



WEST HARTLAND, from the decision of the Supervising Inspector of the Eleventh District, Seattle, Washington, in the matter of the collision between the steamer GOVERNOR and the steamer WEST HARTLAND, on April 1, 1921, made and rendered July 22, 1921, on file in the Office of the Supervising Inspector General, Steamboat-Inspection Service.

D. N. HOOVER,  
Acting Supervising Inspector General.  
(Official Title.)

OFFICE OF THE SECRETARY.

I hereby certify that D. N. Hoover, who signed the foregoing certificate, is now, and was at the time of signing, Acting Supervising Inspector General, Steamboat-Inspection Service, Department of Commerce, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 21st day of September, one thousand nine hundred and twenty-one.

[Seal]

C. H. HUSTON,  
Assistant Secretary of Commerce.



(IB)

(Copy)

“Thrive by Thrift, Buy War Savings Stamps.”

AEK. In reply refer to  
File No. 81438.

DEPARTMENT OF COMMERCE,  
Steamboat-Inspection Service,  
Washington.

August 23, 1921.

F. C. Reagan, Esquire,  
Office of United States Attorney,  
Department of Justice,  
Seattle, Washington.

Sir:

1. The Bureau is in receipt of your letter of the 15th instant, enclosing notice of appeal by Captain John Alwen, Master of the S. S. WEST HARTLAND, from the decision of the Supervising Inspector of the Eleventh District, United States Steamboat-Inspection Service at Seattle, Washington, in the matter of the collision between the S. S. GOVERNOR and the S. S. WEST HARTLAND on April 1, 1921, made and rendered July 22, 1921.

2. It is observed that the notice of appeal is signed by John Alwen, Master, S. S. WEST HARTLAND, and countersigned by yourself as Attorney for Captain John Alwen, Master of S. S. WEST HARTLAND.

3. Receipt is also acknowledged of the brief of Captain John Alwen, signed by you as his attorney, submitted in connection with his appeal from the

decision of the Supervising Inspector of the Eleventh District, United States Steamboat-Inspection Service, Seattle, Washington, made and rendered July 22, 1921.

4. In reply, you are advised that your brief has been very carefully read, thoroughly analyzed, and comprehensively digested. All the evidence adduced at the trial has been considered in all its phases and from every direction, and as to its purpose and effect.

5. In the opinion of the Bureau, your contention that the action of the Supervising Inspector was irregular and not authorized by the law, has no force, as that authority is fully covered by Sections 2 and 3 of the Act of Congress, approved June 10, 1918, and the Supervising Inspector proceeded correctly in his consideration of this case. The method of obtaining evidence in cases of this character, its admission, application and purpose, is not governed by any rules of practice or procedure, and evidence may be secured in any manner that will best tend to elicit the information necessary or desirable in arriving at an intelligent and consistent conclusion and decision. The inuendo contained in your brief directed against the integrity and the impartiality of the Supervising Inspector deserves no consideration at my hand, and will be passed over without comment, as I believe, that he has been eminently fair and impartial in his consideration of this important case, and that there has been no desire on his part to determine any other than a just and consistent conclusion.

6. The previous experience of the Supervising Inspector eminently fits him to determine responsibility for accident or casualty, and his judgment and discretion in such matters should have the most considerate attention. It is quite unnecessary to undertake to answer in detail the various contentions of your brief, many of the contentions being reiterations of protest which add no strength to previous statements upon the same points, but it will suffice to say that I believe that the action of the Supervising Inspector was legal and perfectly regular, his conduct of the case was in accordance with intelligent and impartial procedure, and his conclusion and decision in accordance with the evidence adduced at the trial of Captain Alwen, and fully supported by the incidents attending the collision of the S. S. WEST HARTLAND and the S. S. GOVERNOR on the night of April 1, 1921.

7. The decision of the Supervising Inspector of the Eleventh District, United States Steamboat-Inspection Service, Seattle, Washington, suspending the license of Captain John Alwen for two years from July 22, 1921, is affirmed and the appeal respectfully dismissed.

Respectfully,

(Signed) GEO. UHLER.

Supervising Inspector General.

DNH.

Approved:

(Signed) C. H. HUSTON.

Assistant Secretary of Commerce.

August 24, 1921.

[Endorsed]: Case No. 276-E. Defts. Exhibit "E." United States District Court, Western Dist. of Washington. John Alwen vs. William Fisher, etc. Filed Jan. 10, 1922. ———, Clerk.

No. 3975. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 25, 1923. F. D. Monckton, Clerk.

No. 3975

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# In the United States Circuit Court of Appeals

For the Ninth Circuit

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WILLIAM FISHER, Supervising Inspector for the  
Eleventh District of Steamboat Inspection Serv-  
ice, Department of Commerce of the United  
States, and DONALD AMES and HARRY C. LORD,  
Local Inspectors Steamboat Inspection Service,  
Department of Commerce of the United States,  
*Appellants,*

vs.

JOHN ALWEN,

*Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

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HON. JEREMIAH NETERER, *Judge.*

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## BRIEF OF APPELLANTS

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THOS. P. REVELLE,  
*United States Attorney.*

DE WOLFE EMORY,  
*Special Assistant United States Attorney,*  
*Attorneys for Appellants.*

Office and Postoffice Address: 310 Federal Building,  
Seattle, Washington.

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# In the United States Circuit Court of Appeals

For the Ninth Circuit

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WILLIAM FISHER, Supervising Inspector for the  
Eleventh District of Steamboat Inspection Service,  
Department of Commerce of the United States,  
and DONALD AMES and HARRY C. LORD,  
Local Inspectors Steamboat Inspection Service,  
Department of Commerce of the United States,  
*Appellants,*

vs.

JOHN ALWEN,

---

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

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HON. JEREMIAH NETERER, *Judge.*

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## BRIEF OF APPELLANTS

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## STATEMENT OF CASE

This matter is before the court on an appeal from a decision rendered in the United States District Court for the Western District of Washington, Northern Division, on February 3, 1922, denying the jurisdiction of William Fisher as Supervising In-

inspector for the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, one of the appellants, to suspend the license of appellee as master and pilot.

The facts disclosed that the appellants Donald Ames and Harry C. Lord, acting as a Board of Local Inspectors of the Steamboat Inspection Service of the Department of Commerce of the United States, held an investigation as to the causes and responsibility for a collision that occurred on March 31, 1921, between the S. S. Governor and the S. S. West Hartland, which resulted in the sinking of the S. S. Governor and the loss of the lives of eight persons. The appellee, John Alwen, was the master of the S. S. West Hartland and in charge of her at the time of the collision.

On April 16, 1921, the appellants, Lord and Ames, sitting as the Board of Local Inspectors at Seattle, Washington, made their findings exonerating appellee from all blame and placing responsibility for the collision on certain officers of the S. S. Governor (Tr. pp. 63 and 142). The testimony of the Appellant Lord, who was called as a witness for the plaintiff, shows that the Board of Local Inspectors followed the usual procedure in investigations of that nature (Tr. p. 141). Its purpose was to determine

whether appellee was in part responsible for the collision or for any violation of the statutes with regard to navigation (Tr. p. 141). Appellant Lord testified that while he did not remember whether or not appellee appeared before the Local Board of Inspectors on a written request, that the appellee reported the collision to the office and it naturally followed that he was to appear as a witness and bring such witnesses as he knew had knowledge of the matter (Tr. p. 141). The appellee was given an opportunity to produce whatever witnesses he wanted to upon this hearing. The Local Board furnished the Appellant Fisher with a certified copy of the testimony given before it at the hearing (Tr. p. 140). The findings and decision of the Local Board were transmitted to the Appellant Fisher as Supervising Inspector on April 18, 1921 (Tr. p. 142). The Appellant William Fisher, who at the time was Supervising Inspector for the Eleventh District of the Steamboat Inspection Service of the Department of Commerce of the United States, testified that he *immediately* began a very thorough study of the findings and decision, reviewing them over a great many times as a whole and in detail, and continued his study, reading and analyzing the findings and decision for a period of about two

weeks, completing the same by the first or second of May (Tr. p. 143). Appellant Fisher further testified that his review of the testimony adduced before the Board of Local Inspectors convinced him that the decision exonerating appellee was not warranted by the testimony before the Local Board (Tr. p. 144). He said that nothing could be gained by returning the evidence to the Board or advising them of a contrary decision reached by him because they had already considered the matter and that, although, his review of the testimony convinced him that Captain Alwen was culpable in his management of the S. S. West Hartland, he decided to afford him an opportunity to testify in his own behalf, and in order to proceed in a definite way he decided to present the matter in the form of charges (Tr. p. 144). See Plaintiff's Exhibit "No. 1" for these charges (Tr. p. 159).

The Appellant Fisher further testified that a rough draft of the charges was prepared on May 14, 1921. He then decided to verify his understanding of the statutes in regard to his authority to prefer charges in addition to his review of the Local Board's decision and therefore wired to the Bureau of Investigation on May 14, 1921, but, owing to trouble with the telegraph wires throughout the



country at that time, did not receive a reply until the morning of May 16, 1921, when the bureau advised him that he had the authority to prefer the charges in addition to his review, and conduct a trial. He then had the charges typewritten and deposited in the Post Office at Seattle on May 16, 1921, at 5 o'clock P. M., addressed to the appellee, who then resided in that city (Tr. pp. 144 and 147).

In response to the charges so filed by Appellant Fisher, Captain Alwen appeared before him, the hearing commencing on about the 20th of May, 1921, and continuing for about a month when the taking of the testimony was completed and counsel for appellee requested that said appellant's decision be delayed in order that he might have time to file a brief. The long period of time covered by the hearing resulted from postponements from time to time, some of which were at the request of Appellant Fisher and some of which were at the request of counsel for appellee (Tr. p. 145).

At no time during the hearing by the Supervising Inspector was any objection raised by appellee or his counsel as to Appellant Fisher's right to proceed with the hearing until after all of the evidence directed against the appellee had been introduced, at which time, namely, July 21, 1921, counsel for

appellee moved to dismiss the proceedings. During this same hearing on June 24, 1921, Appellant Fisher notified appellee that the hearing was proceeding as a continuation of the review that he had previously undertaken of the decision of the Local Inspectors (Tr. p. 146). *The appellee himself testified that on the very first day of the hearing before the Appellant Fisher, he knew that Fisher was reviewing the decision of the Board of Local Inspectors* (Tr. p. 138).

On July 22, 1921, Appellant Fisher, as Supervising Inspector, filed his findings, conclusions and decision in which he held that the appellee was guilty of negligence, unskillfulness and inattention in his duties as master of the S. S. West Hartland on the night of March 31, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. Governor, and suspended appellee's license as master and pilot for a period of two years from July 22, 1921 (Tr. p. 70 *et seq.*), whereupon appellee instituted this suit to prevent the carrying into effect of said decision of the Appellant Fisher as Supervising Inspector.

This cause came on for trial before the Honorable Jeremiah Neterer, Judge of the United States District Court in and for the Western District of Wash-

ington, Northern Division, sitting in equity, on the 10th day of January, 1922. After considering the testimony adduced by both parties at said trial, the court on February 3, 1922, rendered its decision denying jurisdiction of the Appellant Fisher to suspend appellee's license as master and pilot (Tr. p. 105) and thereafter on February 21, 1922, a decree was entered in this cause in said court adjudging appellant's said findings, decision and order as Supervising Inspector to be null and void (Tr. p. 113). It is from this decree that appellant prosecutes this appeal.

## ASSIGNMENTS OF ERROR

### I.

That the District Court erred in finding that the appellee on the 3rd day of March, 1921, and ever since has held and does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and other waters, said license numbered 73609, issue No. 5, 5, the same having been issued for the period of five years from December 2, 1918.

### II.

That the District Court erred in finding that the value of the said license to the said appellee at the

time of the commencement of this action and ever since has been and is now more than the sum of \$3,000.00.

### III.

That the District Court erred in finding that no appeal from the written findings and decision of the Appellants Donald Ames and Harry C. Lord, filed on April 16th, 1921, as affecting said appellee, was ever taken, and that no review of said findings and decision was ever had.

### IV.

That the District Court erred in finding that by reason of the findings, conclusion and order of the Appellant William Fisher, mailed to the appellee on July 22d, 1921, and of said William Fisher's threat to enforce said order, the said appellee has been irretrievably damaged and has no plain, speedy and adequate remedy at law in the premises.

### V.

That the District Court erred in finding that since March 31st, 1921, neither the said Appellant William Fisher, as said Supervising Inspector, nor the Supervising Inspector General ever acquired jurisdiction over the said appellee or his said license or his right to use and enjoy the same on account or

by reason of the conduct or actions of said appellee as master of said S. S. West Hartland immediately preceding, at, and immediately after the said collision, or on account or by reason of said findings and decision of said Local Board, or at all.

## VI.

That the District Court erred in decreeing that the findings, decision and order of the Appellant William Fisher as Supervising Inspector, and the decision and order of the Supervising General affirming the said Appellant William Fisher's said findings, decision and order, are null and void.

## VII.

That the District Court erred in perpetually enjoining the said William Fisher as Supervising Inspector from filing with said Local Board his findings, decision and order, or either or any of them, or any decision or order, or any findings, decision or order in any wise reversing, changing or modifying the findings and decision of the said Local Board as to the appellee herein or his license, or from doing anything tending to reverse, modify or change said decision and order of said Local Board as to the said appellee or his said license in the said proceedings.



## VIII.

That the District Court erred in perpetually enjoining the Appellants Donald Ames and Harry C. Lord as members of the Local Board, from placing on file with the records of said Local Board or from complying with, recognizing or receiving any findings, decision or order of the said William Fisher as Supervising Inspector, or from the said Supervising Inspector or anyone else tending to modify, change or reverse their said decision as such Local Board as to the appellee herein, and from cancelling or suspending the license of the said appellee on account of his actions or conduct immediately preceding, at, or immediately following the collision.

## IX.

That the District Court erred in entering its decree herein in favor of the appellee and against the appellants, for the reason that said decree is not supported or sustained by the testimony adduced at the trial of this cause and the statement of evidence herein.

## X.

That the District Court erred in failing to dismiss the bill of complaint herein.

## ARGUMENT

Specifications of Error I, III, V, VI, VII, VIII, IX and X raise what we consider the only point in this case, viz.:

The Jurisdiction of Appellant Fisher as Supervising Inspector of the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, to Review the Decision of the Board of Local Inspectors and to Make Findings and Enter a Decision Thereon.

## (a) PREVIOUS LEGISLATION

The authority for appellant's acts in reviewing said decision of the Board of Local Inspectors and in continuing a hearing before himself and in changing the action of the board is found in an Act of Congress entitled "An Act to Provide for Appeals from Decisions of Boards of Local Inspectors of Vessels, and for other Purposes," approved June 10, 1918; 40 Stat. 602 [Comp. St. §8214 (a) *et seq.*]. Prior to the passage of this act there was no provision for any such review. The act repeals Section 4452 of the Revised Statutes of the United States as amended by Section 6 of the Act of March 3, 1905; 33 Stat. 1028. The original Statute Section 4452 R. S. as amended, etc., provides as follows:

“Whenever any board of local inspectors refuses to grant a license to any person applying for the same, or suspends or revokes the license of any master, mate, engineer or pilot, any person deeming himself wronged by such review, suspension or revocation, may, within thirty days thereof, on application to the Supervising Inspector of the District, have his case examined anew by such Supervising Inspector; and the local board shall furnish to the Supervising Inspector in writing the reason for its doings in the premises and such Supervising Inspector shall examine the case anew and he shall have the same power to summon witnesses and compel their attendance and to administer oaths that are conferred to local inspectors; and such witnesses shall be paid in the same manner as provided for by the preceding section, and such Supervising Inspector may revoke, change or modify the decision of such local board, and like proceedings may be had by any master or owner of any steam vessel in relation to the inspection of such vessel or her machinery, by any such local board, and in case of repairs, and in any investigation or inspection when there shall be a disagreement between the local inspectors, the Supervising Inspector, when so requested, shall investigate and decide the case. In case of trials for the revocation or suspension of an officer's license, where either the license has been revoked or suspension for more than six months has been made, and such action has

been affirmed by the Supervising Inspector, the officer whose license is in question may have the case examined anew by the Supervising Inspector General, who shall have the same power to examine witnesses, to compel their attendance and to administer oaths as is conferred on local inspectors, and the Supervising Inspector General may revoke, change or modify said decision. Application for such re-examination of the case shall be made to the Supervising Inspector General within thirty days after final decision by the Supervising Inspector."

In the case of *Joyce v. Bulger*, 240 Fed. 817 (D. C.), it was held that under this section the right to appeal to the Supervising Inspector from the decision of a board of local steamboat inspectors refusing to grant a license or suspend or revoke a license, was given only to an interested party and that an appeal by a stranger to the proceeding was a nullity and conferred no jurisdiction on the Supervising Inspector. This decision indicated a vital defect in the law as it stood prior to the enactment hereinabove referred to by title.

So ineffective was the original law (Sec. 4452 R. S., as amended) that the Secretary of Commerce caused to be drafted the repealing act approved on June 10, 1918, to which we have referred. Prior



to the passage of this act it was referred to the Committee on the Merchant Marine and Fisheries of the House of Representatives, and that committee made its report to the House showing the necessity for a change in the law. This committee report is set forth in defendant's Exhibit "D" (Tr. p. 182). As stated by the committee, the reasons for the enactment of the measure were to be found in certain facts ascertained in the investigation of the Eastland disaster in Chicago in July, 1915. *It developed, the report shows, that in the course of that investigation the action of the local inspectors was final under existing laws with relation to various situations vitally affecting the public interest.* Included in the committee's report is a copy of a letter dated December 21, 1915, from the Honorable William C. Redfield, then Secretary of Commerce, to Representative J. W. Alexander, in which it is pointed out that the hands of the government were tied in a matter where the board of local inspectors had inflicted a wholly inadequate penalty for the violation of the steamship regulations because the old law was inadequate to meet the situation. The committee points out in its report that under certain circumstances where the public interests are vitally affected, the proposed act provides for a review of



the action of the board of local inspectors on the motion of the supervising inspector.

We thus see the defects which the Act of June 10, 1918, was intended to remedy and the purpose it was intended to serve. That Act provides as follows:

“Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That whenever any person directly interested or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any decision or action of a Supervising Inspector to the Supervising Inspector-General, whose decision, when approved by the Secretary of Commerce, shall be final; Provided, however, that application for such re-examination of the case by a Supervising Inspector, or by the Supervising Inspector-General, shall be made within thirty days after the decision or action appealed from shall have been rendered or taken.

And, provided further, That in all cases reviewed under the provisions of this act, where the issue is the suspension or revocation of the license of a licensed officer, such officer shall be allowed to be represented by counsel and allowed to testify in his own behalf.

Sec. 2. That whenever there shall be a dis-

agreement between the local inspectors in regard to any matter before them for decision, they shall report the case to the Supervising Inspector of the district who shall investigate and decide the same. Any Supervising Inspector may, within thirty days thereafter, upon his own motion, review any decision or action of any board of local inspectors within his district and in like manner the Supervising Inspector-General may, within thirty days thereafter, review any decision or action of any supervising inspector or board of local inspectors, and the decision of the Supervising Inspector-General in such case, shall, when approved by the Secretary of Commerce, be final.

Sec. 3. That any decision or action reviewed by the Supervising Inspector-General, or by any Supervising Inspector, as provided in Sections 1 and 2 of the act, may be revoked, changed, or modified by such reviewing officer, who shall have power to administer oaths and to summon and compel the attendance of witnesses by a similar process as in the District Courts of the United States; and the disbursing clerk, Department of Commerce, shall pay, on properly certified vouchers, such fees to any witness so summoned for his actual travel and attendance as shall be officially certified to by the officer reviewing the case, not exceeding the rate allowed for fees to witnesses for travel and attendance in the district courts of the United States.

Sec. 4. That the Secretary of Commerce

shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this act.

Sec. 5. That Section Four Thousand Four Hundred Fifty-two of the Revised Statutes, as amended by Section 6 of the Act of March 3, 1905, is hereby repealed."

It will be noted that the Act of June 10, 1918, provides for (1) an appeal by any person directly interested or affected by any decision of a board of local inspectors to the supervising inspector; (2) a like appeal from the decision of the Supervising Inspector to the Supervising Inspector-General under circumstances not provided for under the old law; (3) an investigation by the Supervising Inspector in any case where there shall be a disagreement by the local inspectors; (4) a review by the Supervising Inspector *on his own motion* within thirty days after the decision of the board of local inspectors.

It was pursuant to this latter provision of the new law that the Appellant Fisher as Supervising Inspector acted in the present case.

The new law further provides that any decision or action reviewed by the Supervising Inspector may be revoked, changed or modified by the reviewing officer who is given power by Section 3 of said

enactment to administer oaths and to summon and compel the attendance of witnesses. In this connection it should be borne in mind that no limitation whatsoever is placed by Congress on the nature of the revocation, change or modification of the decision or action of the board of local inspectors that may be made under the act by the Supervising Inspector. The act specifies no particular procedure governing a review by the Supervising Inspector on his own motion, as distinguished from an appeal to the Supervising Inspector by an interested or affected party under Section 1, and it is appellants' contention that the Supervising Inspector, sitting as a reviewing officer, acts in an administrative capacity and is not hedged about with the formalities and technical rules of procedure applicable to appeals.

(b) THE SUPERVISING INSPECTOR'S RIGHT TO REVIEW ON HIS OWN MOTION IS NOT CONTROLLED BY DEPARTMENTAL RULES OF PRACTICE REGULATING APPEALS TO THE SUPERVISING INSPECTOR.

The fundamental error in the District Court's decision is its holding that the appeal referred to in Section 1 of the Act of June 10, 1918, is for all present purposes synonymous with the right of re-



view given the Supervising Inspector by Section 2 of said act.

A brief analysis of the act brings out the distinction between "review" and "appeal" as there used. Section 1 provides for an appeal by "any person directly interested or affected" by a decision of the board of local inspectors. The jurisdiction there given the Supervising Inspector is clearly appellate and the procedure necessary to evoke that jurisdiction is made formal and specific by the regulations promulgated by the Department of Commerce, which will be referred to hereafter. By Section 2 of the act the Supervising Inspector is given far different powers. He is to act as arbitrator between the inspectors comprising the local board "whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision." Procedural methods are left entirely to the sound discretion of the Supervising Inspector. His duties as an adjuster of difficulties between the members of the local board are obviously not those of an appellate tribunal. Further, he is given the power to review on his own motion any decision or action of the board of local inspectors within thirty days after the same is rendered. Plainly this does not refer, as the District Court as-



sumed, to a review predicated on appeal. The review is not at the instance of a partisan but at the behest of the reviewing officer himself. Suppose that the decision of the board of local inspectors had been unfavorable to appellee in the first instance and that he had been content to abide by their decision without exercising the privilege of appeal given him under Section 1 of the act. Nevertheless, the Supervising Inspector by his own motion by review would have been empowered to satisfy himself of the justness of the decision below. In making such review he would not have been acting as an appellate tribunal but merely as a reviewing officer empowered by statute to examine into the decisions or actions of inferior officers and to modify the same if need be.

The District Court, going on the assumption that "appeal" and "review" as used in Sections 1 and 2 of the act, respectively, are synonymous terms, fell into the further error of holding that certain regulations promulgated by the Department of Commerce with reference to appeals to Supervising Inspectors were applicable to a review also. The rules referred to were promulgated by the Department of Commerce on May 9, 1921, under the title "Rules of Practice for the Government of Supervis-

ing and Local Inspectors of Steam Vessels in Trials of Licensed Officers of Vessels." Title II of said regulations is under the head "Appeal to Supervising Inspectors," Section 1 thereof, reads as follows:

"The Supervising inspector, upon notice of an appeal from the decision of the local board, provided said notice of appeal shall be made within thirty days from the date of the decision of the local board, shall give notice in writing to said local board to forward a certified copy of their decision, together with the charges and all evidence in writing on file in their office."

The lower court took the position that "the same procedure applies in effecting appeal by the Supervising Inspector as to an appeal by an interested party and that the same notice must be given to the local board" (referring to notice in writing to be given by the Supervising Inspector under the terms of Section 1 of the regulations, *supra*). In this the court erred. Manifestly the section of the regulations referred to was intended to apply to *appeals* by an *interested party* under Section 1 of the Act of June 10, 1918, and to that alone. The regulation provides that the Supervising Inspector shall "upon notice of appeal" notify the local board to certify up their proceedings. No notice of appeal is required on review of the local board's de-

cision by the Supervising Inspector on his own motion. It was also the requirement of a useless act to compel the Supervising Inspector to notify the local board to send up its decision, charges and evidence, for in this case these documents were immediately sent up by the local board "in the usual way" (Tr. pp. 140 and 142). The local inspectors were charged with this duty by statute regardless of notice by the Supervising Inspector. R. S. §4457 (Comp. Stat. §3219).

(c) THE DECISION OF THE BOARD OF LOCAL INSPECTORS WAS ONE SUBJECT TO REVIEW.

The investigation of the local board was for the purpose of ascertaining "whether Captain Alwen was in part responsible for the collision or whether there was any violation under the statutes in regard to navigation for which he was responsible as a licensed officer" (Tr. p. 141). The investigation was concluded by the local board's "findings" absolving appellee from blame. While the local board did not present formal charges against appellee, their "findings" of acquittal as to him came within the scope of "any decision or action" of the local board and as such were subject to review by the Supervising Inspector. In other words, the power of review granted by the act in question to Supervis-

ing Inspectors is not confined to cases where charges have been instituted or are pending before the board of local inspectors.

(d) THE SUPERVISING INSPECTOR MAY REVIEW A  
DECISION OF THE BOARD OF LOCAL INSPEC-  
TORS IN ANY FAIR AND REASON-  
ABLE MANNER.

We have seen that the appellate procedure provided in the regulations has no relation whatever to the powers granted the Supervising Inspector to review on his own motion. Further in this regard, no provision of the Act of June 10, 1918, can be found which attempts to prescribe the procedure for review by a Supervising Inspector. It must therefore, be taken as the intent of Congress to allow the method of review to be determined by the Supervising Inspector himself subject only to the restriction that it be commenced within thirty days from the rendition of the decision.

In the instant case the Appellant Fisher, having received the findings and decision of the local board on April 18, 1921, two days after the decision was rendered, made, on his own motion, a thorough reading and review of the same (Tr. pp. 142 and 143). This review was completed early in May,



Appellant Fisher at that time reaching the conclusion that the action of the local board exonerating appellee was not warranted by the records submitted for review (Tr. p. 144). Appellant Fisher clearly had at the time the power under Section 3 of the Act of June 10, 1918, to "revoke, change or modify" the action of the local board by rendering the decision now complained of, but he very fairly determined to hear further testimony before concluding the issue before him. This he was empowered to do under Section 3 of the act, *supra*. The appellee was, of course, an important witness to be summoned and in the interests of fairness should be permitted to have his own witnesses in attendance. Furthermore, the interests of an orderly proceeding demanded that inasmuch as further testimony was to be heard, the issues should be framed by presenting formal charges against appellee. For these reasons and in order to permit appellee to prepare his own defense beforehand (Tr. p. 144), the summons directed by the Supervising Inspector to appellee specified the particular charges which appellee would be expected to meet (Plaintiff's Exhibit "No. 1," Tr. p. 159). To say that this procedure was an attempt on the part of the Supervising Inspector to prefer "direct charges" against appellee and thus usurp the of-



fice of the local board is to misconstrue the reasons actuating the Supervising Inspector in requesting appellee to appear before him, and to overlook the powers conferred upon the Supervising Inspector by Section 3 of the act to hear additional testimony.

No party to the hearing before the Supervising Inspector seems to have been in doubt that the same was but a continuation of that officer's review of the local board's action in exonerating appellee. Appellee himself testified that he was cognizant of this when he first appeared before Appellant Fisher on May 20, 1921 (Tr. p. 138). It was not until a month later that objection was made by appellee's counsel to the jurisdiction of the Supervising Inspector, and at that time the latter made the following pertinent statement in answer to this objection:

"In further reference to the objection which was interposed to my instituting these proceedings, I desire to state at this time that the board of local inspectors held an investigation of the collision between the steamships Governor and West Hartland, at the conclusion of which, on April 16, 1921, they rendered a decision exonerating Captain John Alwen of the West Hartland. Pursuant to the Act of 1918, I carefully reviewed their proceedings and concluded that the facts brought out did

not warrant the conclusion which they reached as to Captain Alwen, and required further investigation on my part, consequently, on May 16, 1921, in accordance with my duties as Supervising Inspector, I preferred charges and under these charges have conducted this hearing as a part of my review of the case. Under Section 3 of the Act of 1918, I have the authority as a reviewing officer to summon witnesses and hear their testimony the same as in an original proceeding." See Defendant's Exhibit "C" (Tr. pp. 178 and 179).

Another ground for the District Court's holding that no proper review was had in this case was the fact that the decision of the Supervising Inspector did not refer to the decision of the local board and that the title of the proceedings before the Supervising Inspector differed from the title of the proceedings before the local board. No statute or regulation is cited requiring this to be done and the defect in this regard, if any, is not substantial and is highly technical.

Nowhere in the Act of June 10, 1918, or the Regulations of the Department of Commerce can anything be found to warrant the conclusion that the method of procedure above outlined was not contemplated by Congress in providing for a review of the local board's decision by the Supervising Inspector,

and it is submitted that the procedure here followed was a just, fair and reasonable exercise of the power conferred upon the Supervising Inspector by Section 2 of the Act of June 10, 1918.

(e) THE ACT OF JUNE 10, 1918, REQUIRES ONLY  
THAT THE REVIEW BE COMMENCED WITHIN  
30 DAYS AFTER THE RENDITION OF THE  
LOCAL BOARD'S DECISION.

Some contention was made by counsel, though it was not one of the grounds of the District Court's decision, that the Supervising Inspector's review under Section 2 of the act must have been *concluded* by the expiration of the thirty-day period and that this requisite was jurisdictional. The act provides, "Any supervising inspector may, within thirty days thereafter \* \* \* review any decision or action of any board of local inspectors." To say that the commencement of the review within the thirty-day period—as happened here—is not a compliance with these provisions is to give them a very strained construction indeed. The result also would work difficulties in the practical application of the act, for by Section 1 thereof, in the case of appeal it is only necessary to make *application* for re-examination within a period of 30 days. In order to relieve this anomalous situation and to give both sections of the

act an harmonious construction in this regard, it is necessary to hold that a commencement of the review within the thirty-day period suffices.

However, it is not here of paramount importance whether the thirty-day limitation be construed to apply to the commencement of the Supervising Inspector's review or to the conclusion thereof. The Appellant Fisher, as reviewing officer, was acting in a *quasi* judicial capacity and any statutory time limitation directed against him in the performance of his functions as such should be construed not as mandatory but as directory merely.

In the case of *McQuillan v. Donahue*, 49 Cal. 157, it appears that an action of ejectment was tried by the court without a jury and submitted and decided orally in favor of the complainant. No decision in writing was ever given or filed. More than five months after the oral decision, defendant moved to place the cause upon the calendar to be tried again. This motion was denied. The court held, in affirming the judgment, that a statute that provided that "upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the Clerk thirty days after the cause is given for decision and unless the decision is filed

within that time the action must be tried again” is directory merely.

The Supreme Court of South Dakota, in the case of *Edmonds v. Riley*, 15 S. D. 470; 90 N. W. 139, also held that a statute requiring that “upon the trial of a question of fact by the court its decision must be in writing and filed with the Clerk within thirty days after the cause is submitted for decision” is directory, and failure to file the same within the time limit will not affect the judgment.

To the same effect are the following decisions:

*Bruegger v. Cartier*, 29 N. D. 72, 126 N. W. 491;

*Griffith v. Crommey*, 58 S. C. 448, 36 S. E. 738;

*McGary v. Steele*, 20 Ida. 753, 110 Pac. 448;

*Demaras v. Barker*, 33 Wash. 200, 74 Pac. 362;

*Moyan v. Moyan*, 49 Wash. 341, 95 Pac. 271.

It is respectfully submitted that the District Court erred in holding that the Appellant William Fisher as Supervising Inspector did not acquire jurisdiction to review the decision of the board of local inspectors exonerating appellee, and that the procedure followed by Appellant Fisher in review-



ing said decision was contemplated by the provisions of the Act of June 10, 1918.

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DE WOLFE EMORY,  
*Special Assistant United States Attorney,*  
*Attorneys for Appellants.*

IN THE <sup>7</sup>  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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the Eleventh District of Steamboat Inspection  
Service, Department of Commerce of the United  
States, and DONALD AMES and HARRY  
C. LORD, Local Inspectors Steamboat Inspection  
Service, Department of Commerce of the  
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*Appellants,*

*vs.*

JOHN ALWEN,

*Appellee.*

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HON. JEREMIAH NETERER, *Judge.*

---

BRIEF OF AMICUS CURIAE

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MACCORMAC SNOW,  
*Solicitor for United States Shipping Board,*  
*Appearing as Amicus Curiae.*  
502 Platt Bldg., Portland, Oregon.

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No.....

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---

BRIEF OF AMICUS CURIAE

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It is learned that no brief will be filed on behalf  
of Captain Alwen. Accordingly this brief will be  
made more complete than was originally intended.  
In spite of a somewhat bulky record the controlling

facts may be stated in a small compass.

April 1, 1921, the steamship "West Hartland," Captain John Alwen on her bridge and in charge of navigation, collided with the S. S. "Governor" in the waters of Puget Sound, sinking the latter. A day or two later Captains Ames and Lord, Local Inspectors, commenced a preliminary investigation at which the officers of the two vessels were examined. April 16, 1921, the Local Inspectors published findings holding certain officers of the "Governor" responsible for the collision and finding with respect to Captain Alwen that "he is absolved from all blame." (Record 14.) *No charges were then or thereafter preferred against him by the Local Inspectors.*

May 16, 1921, Captain Fisher, Supervising Inspector, sent Captain Alwen a letter by mail (Record 67) charging him with negligence in connection with the collision and adding "at your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire."

Captain Alwen appeared in response to this summons, represented by Frank C. Reagan, Esq., his attorney. A trial was had commencing about May 20th and ending July 22nd (Record 145), several postponements and continuances intervening. At the conclusion of the testimony against Captain Alwen his attorney made an objection challenging the

right of Captain Fisher under the law to conduct the trial. (Record 161.) This objection was overruled, and the trial proceeded. (Record 178.) Captain Alwen put in his testimony and his attorney filed a brief on his behalf. On July 22, 1921, the Supervising Inspector held (Record 70) that Captain Alwen was guilty of negligence, inattention and unskilfulness, in connection with the collision, and further (Record 80),

“his license as master and pilot, No. 73609, issue No. 5, dated December 2, 1918, is hereby suspended for a period of two years from this date, July 22, 1921. Captain Alwen is directed to deposit his license with the United States Local Inspectors at Seattle, where it will remain during the period of his suspension.”

Captain Alwen prosecuted an appeal to the Supervising Inspector General, who on August 2, 1921, affirmed the decree of the Supervising Inspector. (Record 191.)

September 7, 1921, Captain Alwen exhibited his bill in the District Court, praying that the enforcement of Captain Fisher's judgment be restrained on the ground that the trial by him was without warrant of law. An amended complaint (Record 52) was filed, upon which issue was joined, and a trial had, resulting in a decree by Judge Neterer (Record 113) dated February 21, 1922, enjoining the enforcement of the Supervising Inspector's de-

cision. From this decree the present appeal has been prosecuted.

The important question involved is the legality of the trial by Captain Fisher. If this is shown to have been without warrant, we take it that in entering a Federal Court of Equity Captain Alwen chose the proper remedy. *Joyce v. Bulger*, 240 Fed. 817; *Fredenberg v. Whitney*, 240 Fed. 819; *Bulger v. Benson*, 262 Fed. 929.

The officers making up the Steamboat Inspection Service consist of the Local Inspectors, Supervising Inspectors, and Supervising Inspector General. An examination of the statutes (R. S. 4416 *et seq.*) indicates that their duties are *quasi* judicial

Under Section 4450 the Local Board of Inspectors are authorized and required to investigate all acts of incompetency and misconduct by licensed officers and, for this purpose, to compel attendance of witnesses and administer oaths. No similar powers of investigation are given to the Supervising Inspectors or any other officers of the service. If the local boards shall be satisfied that an officer under investigation has been guilty of misbehavior, negligence, or unskilfulness, they are required to suspend or revoke his license. This proceeding has in it the principal elements of a criminal trial before a court of original jurisdiction.

The investigation by the Local Inspectors to determine the causes of the "West Hartland" Gov-



error" collision (Record 140) bore some similarity to a preliminary investigation or that of a grand jury. Its result as to Captain Alwen was analogous to finding a not true bill. We cannot find a statute or regulation expressly authorizing this investigation. However, the practice has long been followed and is not objected to in this case. The important fact is that *no charges were filed against Captain Alwen by or with the Local Inspectors.*

Section 4452 formerly provided for an appeal to the Supervising Inspector of the district by any person deeming himself wronged by a decision of the Local Inspectors, and provided for a similar appeal from a decision of a Supervising Inspector to the Supervising Inspector General. But peculiarly, this section gave no appeal to the Government. When the *Lackawanna* was sunk with two lives lost, through negligence of licensed officers, the Local Inspectors imposed a ridiculously low sentence and the Government was without remedy. (Record 101.) Accordingly the Act of June 10, 1918 (1918 Sup. F. S. A. 829) was passed.

Section I of this Act permits any person directly interested in or affected by any decision or action of any Board of Local Inspectors, who shall feel aggrieved by such decision, to appeal to the Supervising Inspector of the district; and permits a like appeal from any decision or action of any Supervising Inspector to the Supervising Inspector General. The decision of the latter, when approved by



the Secretary of Commerce, is made final. Application for re-examination by a Supervising Inspector or by the Supervising Inspector General is required to be made within thirty days after the decision or action appealed from. Officers may be represented by counsel.

Section II provides that any Supervising Inspector may, within thirty days after a decision by the Local Inspectors, review the same; and in a like manner the Supervising Inspector General may within thirty days review any decision of any Supervising Inspector. The decision of the Supervising inspector General, when approved by the Secretary of Commerce, is final.

Section III provides that any decision so reviewed by any Supervising Inspector, or the Supervising Inspector General, may be revoked, changed or modified by such reviewing officer, who shall have the usual powers with respect to administering oaths and compelling attendance of witnesses.

Section IV permits the Secretary of Commerce to make proper regulations under the Act. Section V repeals the defective R. S. 4452.

Regulations made under the Act provide as follows: (General Rules and Regulations prescribed by Board of Supervising Inspectors, amended January, 1922; Edition of April 7, 1922, page 168.)

“The Supervising Inspector, upon notice of an appeal from the decision of the Local Board, provided said notice of appeal shall be made

within thirty days from the date of the decision of the Local Board, shall give notice in writing to said Local Board to forward a certified copy of their decision, together with the charges and all evidence in writing on file in their office."

On its face the action of the Supervising Inspector in the present case appears irregular and not in accord with the ordinary rights of a person accused of a crime or sought to be penalized. *Captain Alwen was never tried in the equivalent of a court of original jurisdiction.* He appeared and testified at a preliminary hearing and his next notice of any proceedings against him came in the form of charges preferred in the equivalent of an intermediate appellate court. It is taken for granted that this Court will not approve procedure of this sort unless compelled to by an unambiguous and unequivocal requirement of the Act of June 10, 1918.

But the Act of June 10, 1918, is not ambiguous with respect to the present controversy, and the regulations quoted above are well within the spirit and intention of the Act. The Act, by its title, is to "provide for appeals from decisions from Boards of Local Inspectors of Vessels and for other purposes." *Nowhere in the Act can be found any authorization of an original investigation, trial, or other original proceeding.*

The word "appeal" is used throughout the Act. This word has two meanings, each of them well defined. Technically it means a review by a higher

court of a decision of a lower court, through the Civil Law process of a trial *de novo*. *Wiscart v. Douchy*, 3 Dal. 321, 327. In its less technical sense the word denotes such review, generally. We doubt whether the word, as used in the Act of June 10, 1918, was employed other than with a view to its technical and exact meaning. However, it is unnecessary for the Court to decide now which meaning is intended. The point is that the Act relates to review by the equivalent of a higher court and nothing else.

In the present case there was no appellate review. Captain Lord testified: (Record 139.)

“Capt. Fisher, as Supervising Inspector, never asked the Local Board to correct its findings and decisions. Nor did he ever ask the Local Board to explain its findings and decisions; only in conversation. He made no request for any explanation or correction. Capt. Fisher never filed any charge with the Local Board against Capt. Alwen on account of this collision. At the time the local hearing was had there were no charges then pending before the Local Board against Capt. Alwen. Captain Alwen appeared before the Local Board as a witness only. The Local Board furnished Capt. Fisher a certified copy of this hearing.

“Q. ‘Since this case was begun has Capt. Fisher as Supervising Inspector, or the Supervising Inspector General, filed with your Local Board any order or decision tending to affect, or change, or modify, your finding or decision

as to Capt. Alwen?’

“A. ‘None whatever’.”

The only statute authorizing the investigation of the conduct of licensed officers is R. S. 4450 above referred to. This section provides for such investigation by the Local Boards of Inspectors and not by any other officials. The proceeding complained of against Captain Alwen is entitled, “In the Matter of Charges preferred by the United States Supervising Inspector, 11th District, against Capt. John Alwen, etc.” (Record 70.) Neither R. S. 4450 nor any other statute authorizes the Supervising Inspector to prefer charges. Consequently the proceedings instituted by Captain Fisher are void and were properly enjoined.

It is contended on behalf of Captain Fisher that proceedings instituted by him were really in the nature of appellate proceedings; that a certified copy of the record of the preliminary investigation by the Local Board was furnished him (Record 140); that during the thirty days following the decision of the Local Board, he reviewed this record, and that the charges preferred by him against Captain Fisher in effect brought the case before him for review. (Record 143.)

There are two principal answers to this contention: First, there was never any case to appeal, for the reason that Captain Alwen was never brought to trial before the Local Inspectors; and secondly,



even if there had been a case to appeal, the procedure adopted by Captain Fisher would have been improper under the Act of June 10, 1918.

The first objection to the procedure untaken by Captain Fisher is too clear to require further comment. An appeal naturally presupposes something to appeal from. Where no proceeding is instituted, no trial had, and no judgment entered, there naturally can be no appeal. As to the second objection, no question is raised of the power of the Supervising Inspector to review the decision of the Local Inspectors exonerating Captain Alwen, but he could only do so in accordance with the procedure laid down by the statute and regulations, namely, by giving notice in writing to the Local Board to furnish a certified copy of their decision together with all of the evidence on file in their office and by making an order directing further proceedings in the case by the Local Inspectors in accordance with his views. Merely reading the record in secret, without any transfer of the case and without making any formal order, naturally does not constitute an appeal. No proper steps were taken within the time limit, looking toward an appeal to the Supervising Inspector.

It is respectfully submitted that execution of the Supervising Inspector's judgment was properly enjoined, and the decree of the District Court should



be affirmed.

MACCORMAC SNOW,  
*Solicitor for*  
*United States Shipping Board and*  
*United States Shipping Board*  
*Emergency Fleet Corporation*  
*Amicus Curiae.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA, and  
MARK SHELDON, as Commissioner for the  
COMMONWEALTH OF AUSTRALIA,  
Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOW-  
LER and JOHN L. McLEAN, as Trustee in  
Bankruptcy of PATTERSON-MacDON-  
ALD SHIPBUILDING COMPANY, a Cor-  
poration, Bankrupt,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Western District of Washington, Northern Division.

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FILED

FEB 5 - 1923

F. D. MONROTON



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SHIPBUILDING COMPANY, a Corpora-  
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COMMONWEALTH OF AUSTRALIA, and  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names and Addresses of Counsel.**

CORWIN S. SHANK, Esq., Attorney for Appellants, 1002 Alaska Building, Seattle, Washington.

H. C. BELT, Esq., Attorney for Appellants, 1002 Alaska Building, Seattle, Washington.

GLENN J. FAIRBROOK, Esq., Attorney for Appellants, 1002 Alaska Building, Seattle, Washington.

IRA BRONSON, Esq., Attorney for Appellees, 612 Colman Building, Seattle, Washington.

J. S. ROBINSON, Esq., Attorney for Appellees, 612 Colman Building, Seattle, Washington.

H. B. JONES, Esq., Attorney for Appellees, 612 Colman Building, Seattle, Washington. [1\*]



In the District Court of the United States for the Western District of Washington, Northern Division.

6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

### **Order of Adjudication.**

At Seattle, in said District, on the nineteenth day of March, 1920, before the Honorable Jeremiah Neterer, Judge of said Court in Bankruptcy, the

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\*Page-number appearing at foot of page of original certified Transcript of Record.

petition of Patterson-MacDonald Shipbuilding Company, a corporation, that it be adjudged a bankrupt within the true intent and meaning of the Act of Congress relating to bankruptcy, having been heard and duly considered, said Patterson-MacDonald Shipbuilding Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

WITNESS the Honorable JEREMIAH NETERER, Judge of said Court, and the seal thereof at Seattle, in said District, on the nineteenth day of March, 1920.

F. M. HARSHBERGER,

Clerk.

By P. A. Page,

Deputy.

ENTER: JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [2]

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In the District Court of the United States for the Western District of Washington, Northern Division.

6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.



**Order of Reference.**

WHEREAS, the Patterson-MacDonald Ship-building Company, a corporation, of Seattle, in the County of King, and District aforesaid, was on the nineteenth day of March, 1920, duly adjudged a bankrupt upon a petition filed in this Court by it on the nineteenth day of March, 1920, according to the provisions of the Act of Congress relating to bankruptcy,—

IT WAS THEREUPON ORDERED that said matter be referred to Cicero R. Hawkins, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said Act; and that the said Patterson-MacDonald Ship-building Company shall attend the aforesaid referee on the 19th day of March, 1920, at his office, 1204 L. C. Smith Building, Seattle, Washington, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to the said bankrupt.

WITNESS the Honorable JEREMIAH NETERER, Judge of the said Court, and the seal thereof at Seattle, in said District, on the nineteenth day of March, 1920.

F. M. HARSHBERGER,

Clerk.

By P. A. Page,

Deputy.

ENTER: JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [3]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Order Appointing C. R. Hawkins Special Master in Chancery.**

Upon the stipulation of the attorneys for the trustee in bankruptcy and of the attorneys for Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America, it is hereby

ORDERED that C. R. Hawkins be and he hereby is appointed a special master in chancery to take evidence and make findings upon the questions arising out of the proof of secured claim filed by Mark Sheldon, as commissioner for the Commonwealth of Australia in the United States of America, and the objections thereto by the trustee in bankruptcy and submit his findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy.

Done in open court this 12th day of October, 1920.

JEREMIAH NETERER,

Judge.

O. K.—BRONSON, ROBINSON & JONES,

Attys. for Trustee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 12, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [4]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Referee's Certificate on the Petition for Review of Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America.**

To Honorable JEREMIAH NETERER, Judge of the Above-entitled Court:

I, C. R. Hawkins, one of the referees of said court in bankruptcy, do hereby certify that during the course of the proceedings in said cause before me, to wit, on the 7th day of September, 1921, the trustee filed herein his report and petition in which, among other things, he reports as follows, to wit:

“In the controversy between the trustee and the Australian Government, pending before Hon. C. R. Hawkins as Special Master in chancery, there have been two matters submitted to arbitration. One of these was a dispute as to who should pay the cost of certain stores and equipment amounting to approximately \$109,000, which it was agreed by the parties in their contract of March 31, 1919, should be submitted to James Fowler of Seattle for determination. This matter was duly submitted to James Fowler, and considered by him, and an award was made, finding that the bankrupt should stand approximately \$43,000, and the Australian Government approximately \$75,000 of the cost of such items in dispute. Mr. Fowler has now submitted to your trustee his bill for services as arbitrator in this connection in the sum of \$1000, and your trustee believes that this is a reasonable sum for the services of the arbitrator in this connection, and your trustee should be authorized and directed to pay one-half of said amount, as the trustee's share of said expense.

The other matter submitted to arbitration was that of the bankrupt's claim for allowance from the Australian Government on account of work and materials furnished extra to its contract, involving matters in dispute of approximately \$1,114,944.40 which question was referred to a board of arbitrators consisting of Frank Walker, selected by the Australian Gov-



ernment, Frank E. Burns, selected by the Trustee, and W. C. Dawson, selected by the said [5] Walker and Burns. These arbitrators held numerous and lengthy hearings, examined a great amount of evidence, and considered the case very thoroughly, and have made an award finding that the bankrupt is entitled to an allowance from the Australian Government for work done and materials furnished extra to its contract, in the sum of \$1,028,458.66. Under the arrangement for selection of these arbitrators and holding of this arbitration, the trustee should pay the fees of Frank E. Burns, the arbitrator selected by him, and one-half of the fees of W. C. Dawson, the third member of the board; that said Frank E. Burns, and W. C. Dawson have submitted bills for said service in the sum of \$3000 each, and your trustee believes that said charges are fair and reasonable, and that he should be authorized and directed to pay the bill of the said Burns, and one-half of the bill of the said Dawson."

and in said petition asks that a creditors' meeting be called to consider and act upon the matters set out in said report.

Pursuant to said petition an order was made calling a meeting of creditors to be held on the 23d day of September, 1921, and notice of said meeting of creditors was mailed to all the creditors and parties in interest as is required by law; that among other things contained in said notice was the following:



“You are further NOTIFIED that the trustee reports that James Fowler, an arbitrator named in the contract between the Australian Government and the bankrupt corporation, has submitted his bill for services as such arbitrator in the sum of \$1000.00, one-half of which is chargeable against the bankrupt and the trustee recommends the payment thereof, also that Frank E. Burns, selected by the trustee and W. C. Dawson selected as the third man in the arbitration of the bankrupt’s claim for allowance against the Australian Government on account of work and material furnished extra to its contract, have submitted bills for said services in the sum of \$3000.00 each. The service of Frank E. Burns is chargeable to the trustee and one-half of the service of W. C. Dawson is chargeable to the trustee. The trustee recommends the payment of the bills for such services as submitted.”

That at said meeting of creditors, upon the consideration of the matter of the allowances of compensation to the arbitrators mentioned in the trustee’s report and petition and in the notice mailed to creditors, an objection was made on behalf of Mark [6] Sheldon as Commissioner of the Commonwealth of Australia in the United States of America, the Martin General Agency and Aero Alarm Co. on the ground that no compensation whatever could properly be allowed to said arbitrators out of the estate of the bankrupt. No objection whatever was made to the amount of the

allowance asked for by said arbitrators and recommended by the trustee, and upon inquiry by the referee it was expressly stated by Mr. Shank, representing the Commonwealth of Australia, that he considered the amounts asked for by the respective arbitrators and recommended by the trustee, reasonable if any compensation was to be allowed, but that it was his contention that no allowance could be made to said arbitrators out of the estate of the bankrupt.

After due consideration of the objections made, it was announced by the referee that allowances would be made to each of said arbitrators in the sum recommended by the trustee, and subsequently thereto, on the 21st day of October, 1921, an order was made, subject to the approval of the Judge of this court, authorizing and directing the trustee to pay to James Fowler, one-half of his bill for services rendered as arbitrator in the matter submitted to him for arbitration in the sum of \$500.00; to F. E. Burns for his services as arbitrator in the matter submitted to him, W. C. Dawson and Frank Walker, the whole amount of his bill in the sum of \$3000.00, and to W. C. Dawson, one of the arbitrators in said matter, one-half of his bill for services in said arbitration in the sum of \$1500.00.

The said Commissioner for the Commonwealth of Australia feeling aggrieved at said order filed his petition herein for a review of said order, which was granted.

The only questions presented for review are:

First: Whether James Fowler, who was selected

and named as an arbitrator of certain questions in dispute between the parties in this controversy, by said parties [7] themselves, by an agreement dated March 31st, 1919, having performed the services required of him as said arbitrator, is entitled to a reasonable compensation therefor, and whether the trustee in bankruptcy may properly be authorized and directed to pay from the funds of the estate one-half thereof.

Second: Whether Frank E. Burns, selected as an arbitrator by the trustee in bankruptcy, and W. C. Dawson, selected as the third man on the Board of Arbitrators by said Frank E. Burns and Frank Walker, the arbitrator selected by said Commissioner of the Australian Government, to arbitrate certain questions in dispute between said parties as is more fully set out in the findings contained in the order complained of herein, having performed the services required of them are entitled to reasonable compensation therefor, and whether the trustee in bankruptcy may properly be authorized and directed to pay the entire sum found to be a reasonable compensation for the services of said Burns and one-half of the sum found to be a reasonable compensation for the services rendered by said Dawson, out of the funds belonging to said estate.

It was the contention of the Australian Government before me, at said meeting of creditors, that the arbitrator James Fowler was not legally authorized to act as such arbitrator and make an award on the questions submitted to him and for that reason

no allowance of compensation whatever could be made for his services, notwithstanding the fact that both parties to the controversy availed themselves of his services as such arbitrator, appeared before him, submitted evidence and participated in the proceedings until the final conclusion and award.

For like reasons it was urged by said Commissioner of the Australian Government that no allowance whatever could be made to the arbitrators, Burns and Dawson, notwithstanding the fact that said Commissioner of the Australian Government, by Mr. Shank, his attorney, selected Mr. Frank Walker, one of the arbitrators in said matter, who, together with Mr. Burns, selected by the trustee, proceeded to name W. C. Dawson on the board, as was provided by the contract between the parties, and after said board was organized both parties availed themselves of the services of said board, appeared before them, submitted evidence and participated in the proceedings throughout the inquiry until the said award of said [8] arbitrators was made and submitted.

The facts which are pertinent to a review of the questions presented are contained in the order complained of.

I was of the opinion that under all the facts of this case that the respective arbitrators having performed the services for which they were selected and employed were entitled to a reasonable compensation for the services rendered, and as it appeared that the trustee and creditors were all of the opinion that the amount asked for by the re-



spective arbitrators was only a fair and reasonable compensation for the services rendered, the order complained of was made.

I hand up herewith as the record in this case:

1. The order complained of, in which is set out all the facts material to the issues raised.
2. The petition for review.

Dated at Seattle, in said District, this 28th day of December, 1921.

Respectfully submitted,

C. R. HAWKINS,

Referee in Bankruptcy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 29, 1921. F. M. Harshberger, Clerk. P. A. Page, Deputy. [9]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

### **Order for Disbursement.**

This matter coming on for hearing at a creditors' meeting duly held upon the 23d day of September, 1921, at 1204 L. C. Smith Building, Seattle, Washington, at the hour of two o'clock P. M., and ad-



journments thereof, upon trustee's report and petition for authority to pay to James Fowler the sum of \$500, to F. E. Burns, the sum of \$3,000, and to W. C. Dawson, the sum of \$1,500, for an on account of services rendered the trustee and the estate of the above-named bankrupt, and it appearing that by a certain agreement dated March 31, 1919, entered into between the Australian Government and the bankrupt, it was provided that certain questions of stores and equipment in dispute between the parties, and the matter of which of the parties should pay for the same, should be decided by reference to the said James Fowler, and that said matters and questions, involving items in dispute amounting to approximately \$109,000, have been submitted to the said James Fowler for his determination, and considered by him, and an award has been made by him finding that the bankrupt should pay for approximately \$34,000 of the items in dispute, and that the Australian Government should pay for approximately \$75,000 of the items in dispute, and that the services of the same James Fowler have been rendered to, and received by the trustee and the estate in bankruptcy, and that the charges made by said James Fowler for such services amount to the sum of \$1,000, and such charge being expressly agreed to and recognized by all parties present as being fair and reasonable, and that one-half thereof should be borne by the trustee, [10]

And it further appearing that certain other matters in dispute between the bankrupt and the Aus-

tralian Government, represented and appearing by Mark Sheldon, its Commissioner, relating to work and materials claimed by the bankrupt to have been furnished extra to its contract with the Australian Government, and involving matters in dispute of approximately \$1,114,944.40, have heretofore, and pursuant to a provision contained in the contract between the said bankrupt and the Australian Government, been referred and submitted to a board of three arbitrators, consisting of Frank Walker, selected by the Australian Government, Frank E. Burns, selected by the trustee, and W. C. Dawson, selected by said Walker and Burns, which said arbitrators have held numerous and lengthy hearings and examined a great amount of evidence, and considered the case very thoroughly, and have made an award finding that the bankrupt is entitled to an allowance from the Australian Government for work done and materials furnished extra to its contract, in the sum of \$1,028,458.66, and that under the arrangement for the selection of said arbitrators and the holding of said arbitration, the trustee should pay the fees of Frank E. Burns, the arbitrator selected by him, and one-half of the fee of W. C. Dawson, third member of the board of arbitrators, and that the services of said arbitrators have been rendered to and accepted by the trustee and the estate of the above-named bankrupt, and it being expressly agreed and recognized by all parties present that the charges submitted by said arbitrators of \$3,000 on account of the fees of Frank E. Burns, and \$1500

on account of the fees of W. C. Dawson, are fair and reasonable amounts for the services rendered,

And no exception or objection being taken or made to the payment of said sums, except the objection of the Australian Government, Martin General Agency and Aero Automatic Alarm that such sums are not properly chargeable to the trustee and the estate of the bankrupt,

NOW, IT IS ORDERED that the trustee be and he hereby is [11] authorized and directed to execute and deliver his trustee's check, to be duly countersigned by the referee, to the following persons for the following items and amounts, to wit:

JAMES FOWLER:

One-half of bill for services rendered, .....\$ 500

F. E. BURNS:

Services as arbitrator .....\$3,000

W. C. DAWSON:

One-half of bill for services as arbitrator .....\$1,500

Dated in open court at Seattle in said district this 21 day of October, 1921.

C. R. HAWKINS,  
Referee.

Approved:

\_\_\_\_\_,  
Judge.

Filed this 21 day of Oct. 1921, at 10 o'clock A. M.  
C. R. Hawkins, Referee. [12]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Petition for Review.**

The petition of Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America, respectfully represents:

FIRST: That heretofore on July 31, 1920, this petitioner duly presented his secured claim against the said bankrupt founded upon various breaches of a contract for the building by the bankrupt of ten ships for the petitioner, and thereafter the said trustee of the said bankrupt filed certain objections to the said claim.

SECOND: That thereafter on the 12th day of October, 1920, an order was duly entered by a judge of this court in this proceeding appointing C. R. Hawkins a special master to take evidence and make findings upon the questions arising out of the proof of said claim and objections thereto and to submit findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy.

THIRD: That pursuant to the said order parties appeared before the said C. R. Hawkins, as special master, [13] upon the 20th day of Oc-



tober, 1920, and this petitioner proceeded to prove his claim.

FOURTH: That during the progress of the said proof the said trustee objected to any further proceedings before the said special master until certain counterclaims of the trustee against this petitioner had been submitted to certain arbitrators to be appointed pursuant to certain clauses in the said contract, and thereupon the said master, over the objection of this petitioner, refused to proceed further with the said claim until the said matters had been submitted to arbitration.

FIFTH: That the trustee, without obtaining any order or authority from either the judge or the referee of this court, thereupon assumed to employ Frank E. Burns, W. C. Dawson and James Fowler as arbitrators, and the said persons so employed together with Frank Walker thereafter made certain awards and filed the same in this case, and thereafter presented to the said trustee bills for services in the following amounts:—Frank E. Burns \$3000.00; W. C. Dawson \$1500.00; James Fowler \$500.00.

SIXTH: That the said trustee duly filed a report in said cause recommending the payment of the said claims, and thereafter at a creditors' meeting duly held before the Hon. C. R. Hawkins, referee in bankruptcy, this petitioner duly made objections to the said claims as hereinafter set forth, but over the objections of this petitioner the said claims were approved and thereafter upon the 21st day of October, 1921, an order was entered by the



said referee authorizing the payment of said claims.  
[14]

SEVENTH: This petitioner claims that the said ruling and order of the said referee is erroneous for the following reasons:

1. That the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

2. No order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

3. The submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the above-mentioned order appointing a special master to pass upon the said claim.

4. The awards of the said arbitrators are void upon their face.

5. The said arbitrators have rendered no beneficial service to the said trustee for the reason that the said awards have not yet been approved by this Court, but will be found by this Court upon objections which have been offered thereto by this petitioner to be void and of no force and effect.

EIGHTH: That this petitioner desires a review by the Judge of this court of the said order made by the said referee and files his petition therefor, and he therefore prays that the error complained of and the questions of law and fact raised

before the said referee and decided by him may be certified by the said referee to the district judge of this court that he may review the said order heretofore made and make an order setting aside the said order of payment, and that none of the said payments be made, and your petitioner ever prays.

MARK SHELDON,

As Commissioner for the Commonwealth of Australia in the United States of America. [15]

By SHANK, BELT & FAIRBROOK,

His Counsel.

Service of the within paper is hereby admitted this 28th day of October, 1921.

BRONSON, ROBINSON & JONES,

Attorneys for Trustee of Pat McDon.

Filed this 28 day of Oct. 1921, at 4 o'clock P. M.  
C. R. Hawkins, Referee. [16]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

**Order on Petition for Review.**

This cause came on to be heard at this term upon the petition of Mark Sheldon, as Commissioner for the Commonwealth of Australia in the United States of America, to review an order made and entered

by the Referee herein, upon the 21st day of October, 1921, allowing and ordering payment to James Fowler of the sum of Five Hundred Dollars (\$500.00), to F. E. Burns of the sum of Three Thousand Dollars (\$3,000.00), and to F. E. Dawson, of the sum of Fifteen Hundred Dollars, (\$1500.00), and was argued by counsel, and thereupon upon consideration thereof, it was,

ORDERED, ADJUDGED and DECREED as follows:

That said petition be and it hereby is denied, and the said order be and it hereby is approved, confirmed and sustained in every respect.

Done in open court this 26th day of Oct., 1922.

JEREMIAH NETERER,  
Judge.

To the foregoing the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, excepts, and the exception is allowed. Oct. 26, 1922.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [17]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,  
Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES  
FOWLER, and JOHN L. MacLEAN, as  
Trustee in Bankruptcy of PATTERSON-  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,  
Appellees.

**Petition for Appeal.**

And now come the Commonwealth of Australia  
and Mark Sheldon, as Commissioner for the Com-  
monwealth of Australia, claimants in the above-  
mentioned proceeding, and say that on or about  
the 26th day of October, 1922, the said District  
Court entered an order herein in favor of the said  
appellees F. E. Burns, F. E. Dawson, James Fowler  
and John L. MacLean, as trustee in bankruptcy  
of Patterson-MacDonald Shipbuilding Company, a  
corporation, Bankrupt, and against these appel-

lants, wherein it denied the petition of these appellants to review an order made and entered by the referee herein allowing and ordering payment to the said F. E. Burns of the sum of \$3000.00, and to the said F. E. Dawson in the sum of \$1500.00, and to the said James Fowler in the sum of \$500.00, and approving the said payments, in which order and the proceedings had prior thereto in this cause certain errors were committed to [18] the prejudice of these appellants, all of which more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, these appellants hereby appeal from the said order to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in said assignment of errors, and pray that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

Dated November 3d, 1922.

SHANK, BELT & FAIRBROOK,  
Attorneys for Appellants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [19]



In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,  
Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES  
FOWLER and JOHN L. MacLEAN, as  
Trustee in Bankruptcy of PATTERSON-  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,  
Appellees.

**Assignment of Errors.**

And now come the Commonwealth of Australia  
and Mark Sheldon, as Commissioner for the Com-  
monwealth of Australia, the claimants in the above-  
mentioned proceedings, and in connection with their  
appeal from the order entered in the above-entitled  
court and cause on the 26th day of October, 1922,  
approving the order of the referee ordering the  
payment to F. E. Burns in the sum of \$3000.00  
and to F. E. Dawson in the sum of \$1500.00 and  
to James Fowler in the sum of \$500.00, assign the

following errors to be relied upon in their said appeal:

First. The Court erred in not sustaining the objections of these claimants to the order of the said referee on the ground that the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court. [20]

Second. The Court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that no order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

Third. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the order of this Court appointing a special master to pass upon the said claim.

Fourth. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the awards of the said arbitrators are void upon their face.

Fifth. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said arbitrators have rendered no beneficial service to the said trustee.

Sixth. The Court erred in approving the order of the referee ordering payment to the said F. E. Burns in the sum of \$3,000.00, and to the said F. E. Dawson in the sum of \$1500.00, and to the said James Fowler in the sum of \$500.00.

SHANK, BELT & FAIRBROOK,  
Attorneys for Claimants. [21]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy.

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA, and  
MARK SHELDON, as Commissioner for the  
Commonwealth of Australia,

Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOW-  
LER and JOHN L. McLEAN, as Trustee in  
Bankruptcy of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt,

Appellees.

**Order Allowing Appeal.**

The Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, having presented their petition for an appeal from the order heretofore entered in the above-entitled court and cause on the 26th day of October, 1922, denying the petition of the said appellants to review an order made and entered by the referee herein allowing and ordering payment to the said F. E. Burns in the sum of \$3,000 and to the said F. E. Dawson in the sum of \$1,500, and to the said James Fowler in the sum of \$500, and approving the said payments, and an assignment of errors accompanying the same, and it appearing to the court that such petition should be allowed,—

This Court does hereby allow the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit upon the filing of a bond in the sum of \$1,000.00, with good and sufficient surety to be approved by the court, said bond to be conditioned and to operate as both a cost and supersedeas bond.

Done in open court this 3d day of November, 1922.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [23]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, as principals, and the National Surety Company of New York, as surety, are held and firmly bound unto F. E. Burns, F. E. Dawson, James Fowler and John L. McLean as trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, in the full and just sum of one thousand dollars (\$1,000), to be paid to the said F. E. Burns, F. E. Dawson, James Fowler and John L. McLean, as trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, for which payment well and truly to be made, we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 3d day of November in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, lately in the District Court of the United States for the Western District of Washington, Northern Division, in an action pending in said court in bankruptcy, entitled "In the Matter of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt," an order was made and entered against the said principal obligors and in favor of the said obligees allowing and ordering payment to said F. E. Burns in the sum of \$3,000, and to said F. E. Dawson in the sum of \$1,500,



and to said James Fowler in the sum of \$500, and approving said payments in said sums respectively and the said principal obligors have sued out an appeal therefrom.

Now, the condition of the above obligation is such that if the said Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON,

As Commissioner for the Commonwealth of Australia,

By SHANK, BELT & FAIRBROOK,  
Their Attorneys.

NATIONAL SURETY COMPANY,

[Seal]

ROBT. WHYTE,

Attorney in Fact. [24]

Approved this 3d day of November A. D. 1922.

By the Court:

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [25]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.

### **Statement of Evidence.**

At a meeting of the creditors of the Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt, held on October 3, 1921, at 10:00 o'clock P. M., before the Honorable Cicero R. Hawkins, Referee in Bankruptcy, there were present the Referee, Messrs. Bronson, Robinson & Jones, representing the Trustee in Bankruptcy, Mr. Corwin S. Shank, representing the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, and representatives

of other creditors. Among other things, the following proceedings were had and done:

“Mr. JONES.—The next item is the report on the result of the arbitration before Captain Fowler. There was an item in controversy between the Australian Government and the Trustee, involving ship [26] stores and so forth, which was specifically covered in the contract of March 31st and by that contract referred to Captain Fowler for his decision. He arbitrated this and has found that the Australian Government should pay about seventy-four thousand dollars of those charges and the Patterson-MacDonald Shipbuilding Company about thirty-five thousand dollars. I do not know just how much time Captain Fowler put in on this, because I did not conduct this arbitration. Mr. Shank knows, and he knows whether or not the bill which Captain Fowler has rendered of a thousand dollars, is a reasonable bill. That should be apportioned, of course, one-half to the trustee and one-half to the Australian Government. I think, from what I know of the proceedings, that they took a considerable time and involved a great deal of technical knowledge, and I think the bill is a reasonable bill and I have heard no one object to it. I talked it over with Mr. Robinson, who handled the matter, and he thought that was a fair bill, and the trustee is asking for authority to pay Captain Fowler one-half of the amount of his charges.

Mr. SHANK.—I want to raise an objection to these fees which you are asking for the other arbi-

trators, if it is consistent with presenting the other matters at the same time, unless you want them separate I will raise objections to the whole thing.

Mr. JONES.—What objection do you have to Captain Fowler's bill, Mr. Shank?

Mr. SHANK.—On behalf of the Australian Government I desire to object to, not only the item of Captain Fowler, but the next item, I presume, which will be presented, that is the item of fees for Mr. Frank Burns and Mr. Dawson. The grounds of my objection to these fees are that this court has no jurisdiction to refer to or to accept the award of any arbitrators. This referee in bankruptcy was appointed [27] a Special Master by the order of Judge Neterer. That order is the order which fixes the jurisdiction of the Special Master. I will read that order, if the Court please. (Reading order signed by the Honorable Jeremiah Neterer on October 12, 1920.) My position, if the Court please, is that a court of bankruptcy is a court that finds its jurisdiction wholly in the statute. A Special Master is an officer of the District Court who finds his authority embraced entirely in the order creating that court. He has no jurisdiction to take evidence outside of the court nor submit anything to arbitration nor to any other court, but is the exclusive and sole judge of the things that are delegated to him by the order creating him. In other words, the Special Master was not in existence until this order was signed, and when this order was signed that was his sole and absolutely only power as embodied in that



order. Now, what has happened is that there have been two sets of arbitration which the Special Master has said was necessary under the contract, and as a consequence by that act and over our objections at the time we have here now presented bills indicating an expense of ten thousand dollars for so-called arbitration. Mr. Fowler submits a bill for a thousand dollars, five hundred dollars to the estate and I presume in due time he would submit it to the Australian Government, although he has not done so as yet, or submit the balance of it to this estate. As to the other three gentlemen, one has submitted a bill of three thousand dollars; the other has submitted to the estate a bill of fifteen hundred dollars and has submitted to the Australian Government a bill of fifteen hundred dollars, making his three thousand dollars; and the third arbitrator has submitted a bill to the Australian Government of three thousand dollars. I am advised that these bills will be presented to this estate also. Now, we have then this situation; an [28] expense of ten thousand dollars that somebody has got to pay, in the face of this order which creates in the Special Master a special duty authorizing him to do the very things that these arbitrators have attempted to do, and we are now face to face with the question of paying their bills. I raise the question that there was no jurisdiction for the creation of such boards. There is no authority for the creation of any such expense. Whatever services may have been rendered were services which this court could not take cognizance



of, because they were without his jurisdiction, and are not bills which should be paid by this estate. Now, as a matter of fact, I desire to call the court's attention to a couple of cases which I think are to the point. 'The United States Fidelity & Guaranty Company vs. Bray,' 225 U. S., 56 Law Edition. I am reading from page 1055 \* \* \* The same question was raised and discussed, although not in a bankruptcy proceeding, but a well-considered case upon the exclusive jurisdiction of courts, in the case of District of Columbia vs. Bailey, 171 U. S. I am reading from 43 Law Edition page 124. \* \* \* That is exactly the position we take here. First: no arbitration can be had in bankruptcy or growing out of bankruptcy, except such arbitration as is specifically provided by the Bankruptcy Act. This record shows that these arbitrations were not in accordance with and under the provisions of the Bankruptcy Act, but rather under the provisions of a contract made between other parties than the trustee himself, he coming in and saying, 'I assume that we should have that carried out,' and he proceeds then to seek the advice and counsel of a board of arbitrators and to bring that information back to this court, and this court base his decision on that. He has no power under the statute; he cannot make a contract himself without submitting the matter to this court, even such a special matter as [29] settling claims, and I think the statute provides that in all adjustments the creditors have some voice also. Now, without reading further from this decision, this gives the court my view;

first, that the court has no jurisdiction beyond the authority contained in that order creating the court. This order does not give this court any authority to accept the award of anybody, but authorizes and directs the special master to proceed and do the very things which these gentlemen now are presenting bills for doing. What I have said will apply not only to the request for the payment of the bill of Captain Fowler, but will be applied to the requests which will be made, undoubtedly, as they are contained in the petition, for the payment of the bills of Frank Burns and W. C. Dawson. I respectfully submit that this arbitration is null and void upon its face and that if these creditors pay this money out they are paying it out for nothing, and will place the very fund, and the only fund from which they can expect to get paid, in jeopardy because of the fact that they are dissipating the funds for accounts which are on their face void. I respectfully submit that this bill should not be allowed. \* \* \*

Mr. JONES.—If your Honor please, it seems to me that both counsel who have spoken have approached this thing from a different angle than what is really the case. The theory is, as announced here, that this was an arbitration under the Bankruptcy Act or this was an arbitration pursuant to the Bankruptcy Act. This was not an arbitration pursuant to the Bankruptcy Act or under any provision of the Bankruptcy Act at all. The situation arose in this way: The Australian Government presented a claim which was unliqui-

dated: the trustee objected on various grounds, among them on the ground that the claim was unliquidated, and the counsel confessed that that was [30] a good objection and the claim should be liquidated. Now, the Bankruptcy Act provides that claims which are liquidated may be proven and unliquidated claims may be proven after they have been liquidated pursuant to the order of the court and they shall be liquidated in such manner as the court may direct. 'The court' there meaning either the referee or the district judge sitting as a court in bankruptcy. The court might declare or order that the claim should be liquidated in the case before the order in the court, or in any way, as the statute says, that the court may direct. The parties in this case stipulated that the liquidation proceedings here, instead of being heard before the superior court or the district judge, should be heard before your Honor as a special master. Now, it comes up on his complaint in that liquidation proceedings, and an objection is raised that he states no cause or action because he has not shown an offer to arbitrate as required by the contract upon which he is suing. Your Honor holds that that is a good objection and that without an arbitration your Honor will not proceed: and that is the general rule, that the plaintiff cannot maintain his suit unless he shows his offer to arbitrate, or some excuse for the failure, and certainly any legal objections that could lie against the claim would be held, and your Honor hold that he could not maintain his claim before you as special mas-

ter without complying with the terms of his contract. Counsel did not have to arbitrate if he did not want to, but in order to get a claim here which your Honor would entertain he goes into the arbitration; and the arbitration held before Captain Fowler has never been called in question. In fact, it was specifically provided for, and that arbitration was in process before the bankruptcy and before the application, and no one has ever questioned it, and counsel has [31] participated in that arbitration. This is not to be governed by cases passing on the authority of the trustee. The contract was made by Patterson-MacDonald, and the trustee takes the contract with all of its burdens. Suppose that the trustee had been attempting to bring a plenary suit against the Australian Government to recover damages on account of this contract and the Australian Government said, 'No, you have to arbitrate and we have to arbitrate.' The trustee stands in no better position than the bankrupt. He could not forego or refuse to arbitrate where the bankrupt would have to arbitrate, and what you are holding in one case would hold in the other. The argument of counsel that it is beyond the trustee's right—and the case which he quoted at length bore on the right of the commissioners to contract. There is no question here that Patterson-MacDonald had the right to make the contract, and this is an arbitration under the terms of that contract and it has no reference to the bankrupt, in so far as it provides for compromises or arbitration. Coun-



sel raised that point at the time, and the court ruled against him. The general order, to which Mr. Helsell refers, relates to arbitrations under that special provision of the Bankruptcy Act, and not under contract, and that would be correct in a proceeding of that kind, but this is not that kind of a proceeding; and that was all threshed out at the time of counsel's argument as to whether or not an arbitration should be had. In any event, it is too late for counsel to complain. The matter was raised before your Honor by objections and counsel took no objection nor appeal nor exception from that, and he went ahead with the arbitration and never contested it, and it is only when an adverse decision is rendered that he raises the question of jurisdiction. [32]

The trustee employed Mr. Fowler and has taken the benefit of his services and, to my mind, the argument that is made here, while it might be a pertinent argument on the matter of adopting the arbitrator's award, it is not pertinent on the question of their fees, because they have acted in good faith and the trustee has prosecuted this arbitration without the objection of anyone except the Australian Government, and the creditors never made any complaint and they have approved the action of the trustee in those respects, and it seems to me that, regardless of whether the arbitration were of benefit to the estate or not, the trustee would be bound to pay for those services which these gentlemen have rendered.



The REFEREE.—I do not think that the authorities that Mr. Shank reads from apply to a case of this kind. This is not a case where the trustee has contracted for an arbitration or made an agreement for arbitration. This is an arbitration that has its origin and the authority for the arbitration back in the contract that was made between the Patterson-MacDonald Shipbuilding Company before it became insolvent, and the Australian Government. They had the right to make that contract. That is not questioned, that those two parties that made this contract for the building of these ships had the right to provide that any differences that arose between them should be submitted to arbitration rather than to the court, and that they did. Now, the fact that there was a bankruptcy, is that to alter and abridge the terms of this contract? I do not understand that bankruptcy has that effect. It is urged that I was appointed special master here for the purpose of liquidating this claim. I take it that I was appointed with all the right to exercise all the rights that the United States District Court would have had in so far as it pertains to the liquidation. Now, suppose this case [33] had gone up before the United States District Court for liquidation and the demand had been made for arbitration. I take it—I think—I did think and I still think—that either party would have had the right to have had that question arbitrated; and the fact that the District Court appointed someone else to act for it, to receive the evidence and make findings and conclusions, did

not deprive that party of the right to do everything that the District Court would do under the same circumstances. He cannot make the final decree; but his findings, of course, are all subject to review and to the approval of the court; but I think it is the duty of the special master to do the very same things that the court would have had to have done if the matter had been liquidated before the United States District Court. Now, my impression is that this challenge to the jurisdiction is not well taken. I have no doubt that these men are entitled to compensation; whether the special master should fix it or whether the District Court should fix it might be a question—I mean whether the referee or the district court should fix it might be a question, and I would be glad if you could cite any authority on it; and so far as fixing the amount, if there is any objection to the amount as well as to the jurisdiction—is there, Mr. Shank? \* \* \* There certainly was never any objection that I heard of to the arbitration of Captain Fowler; that, as I understand, was already in process. It was not a question raised by either party.

Mr. SHANK.—No. The question as to Captain Fowler was not raised here. I think I would say this—

The REFEREE.—(Interposing.) It was agreed that he should act as arbitrator and he was named, I understand, by the contract itself.

Mr. SHANK.—Yes, by a supplementary contract.  
[34]

The REFEREE.—I will make an order allowing

Captain Fowler five hundred dollars for his services.

Mr. JONES.—The next item referred to in the report is the report on the award of the arbitrators on the claim of the Australian Government. This claim as originally presented by Mr. Shank, was for about eleven hundred thousand dollars. The trustee set up counterclaims and setoffs to an equal or greater amount and mostly those involved items of so-called extras, which were referred to the arbitrators under the court's ruling and the arbitrators have found that the bankrupt is entitled to a claim against the Australian Government of \$1,028,458.66. Now, of those arbitrators one was selected, Mr. Frank Burns, by the trustee, and one was selected, I understand, by Mr. Shank, and those two selected Mr. Dawson, the third arbitrator. Mr. Shank and I had a conversation about this matter before those men were appointed, regarding the fees. Mr. Shank thought that the estate ought to agree to pay them for all of the arbitration, and I said I did not think so; that we would pay our man and one-half of the third, and it was finally agreed that that was the way it would be understood, and so I have reported here that under the arrangement that was made the trustee should pay for the arbitrator selected by him and one-half of the fees of the third arbitrator. The arbitrators put in their bills for three thousand dollars each, and I understand that some objection was raised on that question. The arbitration was begun in October or November of last year and terminated in June of

this year, and the arbitrators held something like thirty meetings. They considered a stack of evidence a foot or a foot and a half high, consisting of depositions and so forth, and I understood it was the theory—Mr. Walker said, ‘Well, we have held thirty meetings, and if I were going to put in my time at other work I would make at least one [35] hundred dollars a day for the time represented by each of those meetings,’ and they thought the bill ought to be three thousand dollars. The trustee and I had considered the matter, and we had thought that twenty-five hundred dollars was, probably, a fair fee, but when the bill came in for three thousand dollars we didn’t feel that we could haggle about the matter of five hundred dollars, especially in view of the fact that the arbitrators had rendered a decision so favorable to the estate, that for the trustee to turn around and squabble over that amount, did not look very dignified, and the trustee has recommended that this, in his judgment, is a fair item to be allowed. In proposition to the work that was done by Captain Fowler, they have done, probably, five or six times as much work and, of course, the amount involved is a great deal more, and it involved matters of technical knowledge that they were qualified to pass on and the ordinary layman would not be.

Mr. SHANK.—On behalf of the Australian Government I desire to interpose the same objections that I introduced with reference to the allowance of the fee to Captain Fowler, without repeating



them, and it will not be necessary for me to argue the questions again.

The REFEREE.—Do you also object to the amount of the allowance, if any allowance has to be made?

Mr. SHANK.—I think, if they are entitled to any fee at all, they are entitled to the amount they are asking for: this applies to the Fowler claim also.

The REFEREE.—Are there any objections to the amount by any of the creditors? If there is no objection on the part of any of the creditors other than has been stated here by the representatives of the Australian Government although they are objections to the allowance, he thinks this is a reasonable sum. It strikes me that it is rather a large sum and I would feel disposed that I ought to hear some testimony as to the value of those services, but if it is [36] satisfactory to all the creditors, why, of course, I do not feel that it is my place to inject my personal opinion of the matter, and if it is the desire of the creditors that they be allowed this amount, provided that they are entitled to anything, I shall make that allowance, because I believe that they are entitled to an allowance, and if this is considered by all of the creditors satisfactory, I will adopt those figures.”  
[37]



In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,

Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.

**Certificate to Statement of Evidence.**

It appearing that the within and foregoing statement of evidence was lodged in due time with the clerk of this court and that due and proper notice of such lodgment and of the time and place of the proposed settlement thereof was given to the attorneys for the appellees, and it appearing that the said statement is true, complete and properly prepared, it is therefore

ORDERED that the same be approved and settled and approved as a true, complete and properly

prepared statement of the evidence introduced in said cause reduced to narrative form.

Dated this 22d day of January, 1923.

JEREMIAH NETERER,

District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [38]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.

**Praecipe for Record on Appeal.**

To F. M. Harshberger, Clerk of said Court:

Will you kindly incorporate into the transcript of the record upon the appeal of the above-named appellants from the order entered in said court and cause upon the 26th day of October, 1922, approving the order of payment of arbitrators' fees to the above-named appellees Burns, Dawson and Fowler the following portion of the record, to wit:

- (1) Order of adjudication of bankruptcy.
- (2) Order of reference.
- (3) Order appointing C. R. Hawkins special master dated October 12, 1922.
- (4) Referee's certificate in matter of arbitrators' fees.
- (5) Order of referee for payment of arbitrators' fees sent up accompanying the said referee's certificate. [39]
- (6) Appellant's petition for review sent up accompanying said referee's certificate.
- (7) Order of court entered October 26, 1922, approving referee's order of payment.
- (8) Petition for appeal from said order.
- (9) Assignment of errors accompanying said petition.
- (10) Order allowing said appeal.
- (11) Bond on said appeal.
- (12) Citation on said appeal.
- (13) Statement of evidence accompanying said appeal.

Dated this 17th day of November, 1922.

SHANK, BELT & FAIRBROOK,

Attorneys for said Appellants.

Service of the within paper is hereby admitted  
this 17th day of Nov. 1922.

BRONSON, ROBINSON & JONES,

Attorneys for Appellees.

[Indorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division. Nov. 20, 1922. F. M. Harshberger, Clerk.  
By P. A. Page, Deputy. [39½]

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In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 6361—IN BANKRUPTCY.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt,

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,

Appellants,

vs.

F. E. BURNS, F. E. DAWSON, JAMES FOW-  
LER and JOHN L. McLEAN, as Trustee  
in Bankruptcy of PATTERSON-Mac-  
DONALD SHIPBUILDING COMPANY,  
a Corporation, Bankrupt,

Appellees.

# **Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 391½, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for [40] the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the petitioners and appellants herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return	109 folios	
at 15c .....		\$16.35
Certificate of Clerk to transcript of Record,		
4 folios at 15c .....		.60
Seal to said certificate .....		.20



I hereby certify that the above cost for preparing and certifying record, amounting to \$17.15, has been paid to me by attorneys for appellants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 24th day of January, 1923.

[Seal] F. M. HARSHBERGER,  
Clerk United States District Court, Western District of Washington. [41]

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**Citation.**

United States of America,—ss.

To F. E. Burns, F. E. Dawson, James Fowler and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt:

You are hereby notified that in a certain cause in bankruptcy in the United States District Court of the United States for the Western District of Washington, Northern Division, entitled "In the Matter of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt," an appeal has been allowed the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, claimants therein, to the United States Circuit Court of Appeals for the Ninth Circuit, and

you are hereby cited and admonished to be and appear in said court at San Francisco on or before the 1st day of December, 1922, to show cause, if any there be, why the order appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 3d day of November A. D. 1922.

JEREMIAH NETERER,  
United States District Judge. [42]

[Endorsed]: In Bankruptcy—No. 6361. United States District Court, for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Citation (F. E. Burns et al). Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 9, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Service of the within paper is hereby admitted this 3d day of November, 1922.

BRONSON, ROBINSON & JONES,  
Attorneys for Appellees.

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[Endorsed]: No. 3977. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of

Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, Appellants, vs. F. E. Burns, F. E. Dawson, James Fowler and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 26, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corporation,  
Bankrupt,

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,

vs.

F. E. BURNS et al.,

Appellees.

**Order Extending Time to and Including January  
29, 1923, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in open court, and good and sufficient cause having been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that the said appellants, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, be and they hereby are allowed additional time up to and including the 29th day of January, 1923, in which to file in the United States Circuit Court of Appeals for the Ninth Circuit the record in this cause, being the appeal of the said appellants from the decree entered herein on the 26th day of October, 1922, in favor of the said appellees.

Done in open court this 23d day of January, 1923.

JEREMIAH NETERER,

District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Order Extending Time.

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,  
vs.

F. E. BURNS et al.,

Appellees.

**Order Extending Time to and Including January  
20, 1923, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in  
open court, and good and sufficient cause having  
been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that  
the said appellants, Commonwealth of Australia  
and Mark Sheldon, as Commissioner for the Com-  
monwealth of Australia, be and they hereby are  
allowed additional time up to and including the 20th  
day of January, 1923, in which to file in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit the record in this cause, being the appeal of the  
said appellants from the decree entered herein on  
the 26th day of October, 1922, in favor of the said  
appellees.



Done in open court this 11th day of December, 1922.

JEREMIAH NETERER,  
District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Co., etc., Bankrupt. Commonwealth of Australia et al., Appellants. F. E. Burns et al., Appellees. Order Extending Time. Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 11, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corporation,  
Bankrupt.

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,

vs.

F. E. BURNS et al.,

Appellees.

**Order Extending Time to and Including December  
22, 1922, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in

court, and good and sufficient cause having been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that the said appellants, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, be and they hereby are allowed additional time up to and including the 22d day of December, 1922, in which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the record in this cause, being the appeal of the said appellants from the decree entered herein on the 26th day of October, 1922, in favor of the said appellees.

Done in open court this 29th day of November, 1922.

JEREMIAH NETERER,

District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court, for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Company, Bankrupt. Order Extending Time. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 29, 1922. F. M. Harshberger Clerk. By P. A. Page, Deputy.

No. 3977. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Jan. 29, 1923, to File Record and Docket Cause. Filed Jan. 26, 1923. F. D. Monekton, Clerk.

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**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

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In the Matter of

PATTERSON - MACDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt.

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COMMONWEALTH OF AUSTRALIA, *Petitioner,*  
vs.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and  
JOHN L. McLEAN, as Trustee in Bankruptcy  
of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, Bankrupt, *Respondents.*

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COMMONWEALTH OF AUSTRALIA and MARK SHEL-  
DON, as Commissioner for the Commonwealth  
of Australia, *Appellants,*  
vs.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and  
JOHN L. McLEAN, as Trustee in Bankruptcy  
of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, *Appellees.*

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**BRIEF OF RESPONDENTS AND APPELLEES**

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IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

*Attorneys for Respondents  
and Appellees.*

614 Colman Building, Seattle, Washington.

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FILED

FEB 16 1923

F. D. MONCKTON,



**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

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In the Matter of

PATTERSON - MACDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt.

---

COMMONWEALTH OF AUSTRALIA, *Petitioner,*  
VS.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and  
JOHN L. McLEAN, as Trustee in Bankruptcy  
of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, Bankrupt, *Respondents.*

---

COMMONWEALTH OF AUSTRALIA and MARK SHEL-  
DON, as Commissioner for the Commonwealth  
of Australia, *Appellants,*  
VS.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and  
JOHN L. McLEAN, as Trustee in Bankruptcy  
of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, *Appellees.*

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**BRIEF OF RESPONDENTS AND APPELLEES**

---

IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

*Attorneys for Respondents  
and Appellees.*

614 Colman Building, Seattle, Washington.

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**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

In the Matter of PATTERSON-MacDONALD SHIPBUILD- ING COMPANY, a Corporation, Bankrupt.		}
<hr/>		
COMMONWEALTH OF AUSTRALIA, <i>Petitioner,</i>	}	No. 3960
VS.		
F. E. BURNS, W. C. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson- MacDonald Shipbuilding Company, a Corporation, Bankrupt, <i>Respondents.</i>	}	No. 3977
<hr/>		
COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia, <i>Appellants,</i>	}	No. 3977
VS.		
F. E. BURNS, W. C. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of Patterson- MacDonald Shipbuilding Company, a Corporation, Bankrupt, <i>Appellees.</i>	}	No. 3977
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**Brief of Respondents and Appellees**

**MOTION TO DISMISS APPEAL**

The same question presented by the petition to revise is also brought up by an appeal, and it has been stipulated that both proceedings may be con-

sidered and disposed of together. The appellees now move that this appeal be dismissed, for the reason that this court is without jurisdiction to entertain the same, and appellant is in default under Rule twenty-four of this court.

## ARGUMENT UPON MOTION TO DISMISS APPEAL

The order appealed from confirms an order of the referee making an allowance to <sup>Burns, Davidson & Son</sup> ~~A. M. MacDonald~~ <sup>by them</sup> for services rendered ~~and expenses incurred~~ by him at the request of the trustee in connection with the administration of the estate and for its benefit. Such an order relates solely to a proceeding in bankruptcy of an administrative character and is not appealable under any of the provisions of the Bankruptcy Act. It does not constitute the allowance or rejection of a claim under Section 25-a (3).

*W. J. Davidson & Co. v. Friedman*, 140 Fed. 853, (C. C. A. 6th Cir.)

*Ohio Valley Bank Co. v. Switzer*, 153 Fed. 362, (C. C. A. 6th Cir.)

The order is subject to review in matter of law only under Section 24-b, and this remedy excludes jurisdiction of an appeal.

*W. J. Davidson & Co. v. Friedman*, *supra*.

*Ohio Valley Bank Co. v. Switzer*, *supra*.

*Kinkead v. J. Bacon & Son*, 230 Fed. 362, (C. C. A. 6th Cir.)

*Petition of Baxter*, 269 Fed. 344, (C. C. A. 6th Cir.)

*Yaryan Rosin & Turpentine Co. v. Isaac*, 270 Fed. 710, (C. C. A. 5th Cir.)

See also:

*In re Loving*, 224 U. S. 183, 56 L. Ed. 725.

*In re Creech Bros. Lbr. Co.*, 240 Fed. 8, (C. C. A. 9th Cir.)

*Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, (C. C. A. 9th Cir.)

*In re Mueller*, 135 Fed. 711, (C. C. A. 6th Cir.)

*Kirsner v. Taliaferro*, 202 Fed. 51, (C. C. A. 4th Cir.)

Furthermore, the appellant has failed to file any brief in support of its appeal, as required by Rule twenty-four.

## MOTION TO DISMISS PETITION FOR REVIEW

Respondents move that the petition for review be dismissed, because petitioner is not entitled to maintain the same.

## ARGUMENT UPON MOTION TO DISMISS PETITION FOR REVIEW

(a) When the petitioner's claim was originally presented to the referee in the bankruptcy proceedings, it was objected to by the trustee on various grounds, one being that the claim was unliqui-

dated. This ground of objection was confessed, and liquidation proceedings were instituted upon application to and direction of the district judge, who referred the matter to a special master. These liquidation proceedings have resulted in a finding and report by the special master, that petitioner has no claim, and that instead of the bankrupt being indebted to the claimant, it has overpaid the claimant \$312,602.48. The master's report has been confirmed by the district court, and an appeal from this decision has been taken. The determination of whether the petitioner is a creditor of the bankrupt involves questions of fact which cannot be considered in this proceeding.

*Whitla & Nelson v. Boyd*, 213 Fed. 587, (C. C. A. 9th Cir.)

*In re Henry Siegel Co.*, 216 Fed. 943 (p. 946) (D. C. Mass).

*Chatfield et al. vs. O'Dwyer*, 101 Fed. 797, (C. C. A. 9th Cir.)

*Gaudette v. Graham*, 164 Fed. 311, (C. C. A. 9th Cir.)

*Kenova Loan & Trust Co., v. Graham*, 135 Fed. 717, (C. C. A. 4th Cir.)

*In re Ann Arbor Machine Corp.*, 274 Fed. 24, (C. C. A. 6th Cir.)

Upon the record as it stands in this case, the petitioner is not a creditor, and is therefore not a party aggrieved who is entitled to bring a petition under Section 24-b of the Bankruptcy Act. (See respondents' answer, paragraph I).



(b) Even if petitioner be recognized as a party aggrieved, it cannot maintain this proceeding unless it shows that it has made a demand upon the trustee to review the order and he has refused to do so, and it has then upon motion been granted permission by the court to proceed in its own name.

*In re Mexico Hardware Co.*, 197 Fed. 650,  
(D. C. New Mexico).

*Shatfield et al. vs. O'Dwyer*, 101 Fed. 797,  
(C. C. A. 8th Cir.)

In this case, no request was made upon the trustee to act, nor any permission secured by the petitioner, granting it leave to bring these proceedings in its own name. The petitioner, forseeing this objection, has endeavored to meet it by the allegations of paragraph twelve of its petition, but these allegations, even if true, are insufficient to excuse its failure to follow the proper procedure.

*In re Mexico Hardware Co.*, *supra*.

The reasons for the application of this rule are particularly strong in the present case, where petitioner has been twice determined to be not a creditor but a debtor of the estate. It has held up this order since the 23rd of August, 1922, and if it is entitled to maintain this proceeding, it can likewise interfere in its own name with every administrative step in the bankruptcy proceedings. To permit it to do this would be contrary to the salutary principles announced in the above cases.

## ARGUMENT ON PETITION TO REVISE

We shall consider first the allowance to respondent Fowler, which is wholly separate and distinct from the allowances to respondents Burns and Dawson, although made at the same meeting and included in the same order.

On July 31st, 1920, the petitioner filed a large claim against the bankrupt with the referee, to which the trustee made written objection on various grounds, one of which was that the claim was unliquidated. Thereupon petitioner applied to Judge Neterer pursuant to Section 63-b of the Bankruptcy Act, for an order directing the manner of liquidating said claim. On October 12th, 1920, the matter was referred to Honorable C. R. Hawkins, as special master, he being the same person as the referee before whom the bankruptcy proceedings were and still are pending.

Prior to the bankruptcy, on March 31st, 1919, the bankrupt and this petitioner had entered into an agreement, which, among other things, provided as follows:

“As regards certain questions of stores and equipment hitherto in dispute (such as awnings, canvas covers, certain deck equipment, engine room tools, compasses, binnacles, sidelights, etc.), it is now agreed that the question whether the cost of these items, or any of them, is to be paid by the owner or contractor, shall be decided by reference to Mr. Fowler, Lloyd’s

Surveyor in Seattle, whose decision shall be binding upon both parties.”

The items mentioned in this agreement had already been submitted to Mr. Fowler by the parties, and the controversy was under consideration by him at the time of the adjudication. (Respondents' answer, paragraph III). During the course of the liquidation proceedings before the special master, both the petitioner and the trustee appeared before Mr. Fowler and continued the arbitration previously begun, submitted evidence in support of their respective claims, and participated in the proceedings until their final conclusion. (Record, p. 16). Mr. Fowler subsequently rendered an award finding that certain of the items in dispute should be paid for by the bankrupt, and certain others by the petitioner. This award was presented to and adopted by the special master in passing on petitioner's claim, as conclusive on the matters covered thereby, and no other evidence was offered as to such items.

The referee certifies that the services of Mr. Fowler were rendered to and received by the trustee, and all parties, even the petitioner, admitted that the allowance made to him was reasonable compensation for what he had done. (Record p. 14; Record on Appeal, p. 42). No objection was ever made by the petitioner to the arbitration by Mr. Fowler (Record on Appeal, p. 39). Mr. Fowler rendered his services in good faith, and they were of a character calculated to benefit the estate, be-

cause the proceedings provided an informal way of arriving at a just decision of matters in dispute between the parties, involving questions of a technical character relating to ship construction.

“The allowance of necessary expenses in the bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof.”

*United States v. Ward*, 257 Fed. 372 at p. 377 (C. C. A. 8th Cir.)

The petitioner has no standing in these bankruptcy proceedings to entitle it to complain of this allowance. It has not up to the present shown itself to be a creditor that can be recognized under the Bankruptcy Act. Its claim has been in litigation for over two years, and has been disallowed by two judges, and most of the issues in which it has joined on submission to the arbitrators have been decided against it. Even if it has a claim, it is an unliquidated one, and therefore, for the present, not provable so as to entitle it to participate in the proceedings in bankruptcy.

“Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may *thereafter* be proved and allowed against his estate.”

Bankruptcy Act, Section 63-b.

Furthermore, the petitioner should be held estopped to question what it has so actively and



expressly joined in and encouraged. By its written agreement with the bankrupt, it submitted this dispute as to certain questions of a technical character to Mr. Fowler, Lloyd's Surveyor at Seattle, a man specially qualified to pass upon such questions, solemnly agreeing to accept his decision as binding. It went forward with the submission both before and after the adjudication and reference to the special master, presented its evidence, argued its case, proceeded to an award without objection, and then being dissatisfied therewith, and unwilling to pay the arbitrator his fees, for the first time raised the point that the proceeding was void. Such an attitude and claim now is extraordinary. Whoever else, as a party in interest to the bankruptcy, might be entitled to question the employment of an arbitrator by the trustee, surely this petitioner has no standing to do so. Yet in the face of all this, it is contended that the arbitration proceedings before him were void.

It should be borne in mind that this arbitration proceeding was provided for by the contract of the parties made before bankruptcy, and actively entered upon before the adjudication. By its contract with the petitioner, the bankrupt enjoyed the right to have the question of whether certain specified articles were or were not to be furnished by it under its contract for the construction of ships, determined by an expert in such matters. The controversy was pending before him at the time of the adjudication. The trustee merely proceeded



with it in place of the bankrupt, as he was authorized to do under Sections 11-b and 11-c of the Bankruptcy Act. Section 70-a (3) of the Act provides that the trustee shall succeed to powers which the bankrupt might have exercised for his own benefit. Here was a power to have a controversy settled in a certain way, which the bankrupt was entitled to have enforced, and certainly the trustee, if he so elects, may take advantage of the same provision.

Suppose, for instance, that the trustee had brought suit against the petitioner upon its contract with the bankrupt. The trustee would have stood in the shoes of the bankrupt, and in adopting its contract, would be held to have accepted all of its conditions.

Collier on Bankruptcy, 11th Ed., p. 1117-1120.

"A party cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill."

*In re Standard Laundry Co.*, 112 Fed. 126,  
(D. C. California).

The petitioner would not, in such a case, be prevented by the bankruptcy from insisting upon compliance with the provisions of the contract regarding arbitration. The trustee could be made to arbitrate the question before Captain Fowler. If bankruptcy would not affect the contract in that respect in that case, then it should not affect it in this case. If the trustee accepts the contract and

relies on the arbitration provision, there is certainly no reason why this petitioner should not be bound by it. It would, indeed, be a most astonishing travesty upon the administration of the law to permit this petitioner now to assail and impeach the decision of a tribunal created by its own solemn act and deed, recognized by its voluntary submission and besought for a favorable decision, and not objected to until after an adverse award was rendered. If Mr. Fowler's award had been favorable to the petitioner, it would not be complaining of this order. To permit it to do so when the award is adverse is to encourage speculation with the court contrary to all of the authorities. (See opinion of Judge Neterer in this matter, and authorities cited 284 Fed. 277 at page 281).

"What kind of arbitration would it be, if each party, solemnly in writing pledging himself to its terms, could nevertheless destroy it by revocation after the real question in controversy were decided against him? \* \* \*

"The ethical impropriety of the defeated owner's revocation at such a stage in the proceeding is obvious and will not be sanctioned by a court except under the compulsion of rules of law clearly applicable."

*Toledo S. S. Co. v. Zenith Transportation Co.*, 184 Fed. 391 at p. 396 (C. C. A. 6th Cir.)

We cannot conceive how the petitioner, upon any ground, can be permitted to overthrow this

allowance to Mr. Fowler. Indeed, it does not in its argument, make any specific reference to this particular item of allowance, but concerns itself primarily with attacking the allowances to respondents Burns and Dawson, as members of the board of arbitrators, selected under the provisions of the contract of December 18th, 1918, to pass upon the question of extras. Reference to the opinion of the district judge in adopting the special master's report, (284 Fed. 277) shows that it was the award of the board, rather than of Mr. Fowler, which was in dispute. Inasmuch as specific grounds of objection to this allowance are not set forth in the brief, we shall not discuss this matter further. It invites application of the rule that errors assigned but not discussed in the brief will be disregarded.

*Consolidated Interstate-Callahan M. Co. v. Witkouski*, 249 Fed. 833, (C. C. A. 9th Cir.) See p. 840.

*Cisco v. Looper*, 236 Fed. 336, (C. C. A. 8th Cir.)

*Repauno Chemical Co. v. Victor Hdw. Co.*, 101 Fed. 948 (C. C. A. 8th Cir.)

Taking up now the allowances to Burns and Dawson, we desire to call attention in somewhat greater detail than is done in petitioner's brief, to what actually transpired.

Upon the reference to the special master, issues were joined upon petitioner's claim, one of the points raised being that under paragraphs eighteen

and seven of the contract upon which the claim was based, the differences between the parties, at least so far as concerned the question of extras claimed by the bankrupt against the petitioner, should be submitted to a board of arbitrators to be selected in accordance with the contract. The master ruled that the question of extras should be so submitted. Thereupon the trustee selected respondent Burns as an arbitrator; the petitioner selected an arbitrator, Mr. Frank Walker; and these two selected as the third member of the board the respondent Dawson. (Respondents' Answer, paragraphs I and II). Under the arrangement for holding the arbitration, it was understood and agreed that each party should pay the fees of the arbitrator selected by him, and one-half of the fees of the third arbitrator. (Record, p. 20). This board held numerous and lengthy hearings, examined a great amount of evidence, considered the case very thoroughly, and thereafter made an award upon the question of extras submitted to them, finding that the bankrupt was entitled to a credit against the petitioner for work done and materials furnished extra to its contract in the sum of \$1,028,458.68. (Record, pp. 19 and 20). The referee certifies that

“After said board was organized, both parties availed themselves of the services of said board, appeared before them, submitted evidence and participated in the proceedings throughout the inquiry until the said award



of said arbitrators was made and submitted.”  
(Record, pp. 16 and 17).

It was expressly agreed by the petitioner that the amount allowed for the services of these arbitrators was reasonable compensation for what they had done. (Record, pp. 14, 17, 20; Record on Appeal, p. 42).

This award of the arbitrators was accepted by the master in arriving at his decision upon the liquidation of the claim, as establishing the amount of credit to be allowed the bankrupt on account of extras, and his report has been confirmed and adopted by the district court.

*In re Patterson-MacDonald Shipbuilding Company*, 284 Fed. 277.

Much of what we have said above in discussing the allowance to respondent Fowler applies also to these allowances, and conversely, a great deal of the argument as to the latter, is also relevant to the former item, and we respectfully ask that this be borne in mind and so considered.

The petitioner expressly limits itself (Petitioner's Brief, pp. 6 and 7) to the claim that the arbitration was void for failure to comply with Section 26 of the Bankruptcy Act, and General Order 33. The respondents submit that these requirements were substantially complied with, certainly beyond the point of any jurisdictional defect, and even if there were irregularities in the procedure, they were of a minor and unimportant character, to which neither the petitioner nor any other creditor



took objection at the time they occurred, and that the petitioner is least of all entitled to complain.

The scope of General Order 33 is administrative rather than jurisdictional, and is intended to inform and advise the court of the proceedings proposed to be taken by arbitration, as a basis for securing the court's consent thereto. The trustee, in his answer to petitioner's claim in liquidation, had set forth the facts upon which he based his claim for arbitration, and demanded it. Upon consideration of this point, the special master, who was also the referee, ordered arbitration to be had upon a specific question, to-wit: the amount of extras for which the trustee was entitled to credit against the petitioner under the contract. Now, whether we consider this liquidation proceeding as strictly a proceeding in bankruptcy, or on the other hand, as a separate proceeding, either an entirely independent one, or a controversy arising in the bankruptcy proceeding, the referee, who was the same person as the special master, was fully advised as to the point in dispute, and the trustee's request for arbitration. The information which General Order 33 was designed to provide, was furnished to him. Definite issues, if any were required, were settled by him, to-wit: extras under the contract.

The special master, who was also the referee, ordered arbitration upon the specific question of extras. Section 26 does not require a formal order, but simply the direction of the court. Under rule fifteen of the Bankruptcy Rules of the Circuit

Court, adopted by the District Court for the District of Washington, referees have all the power of the court of bankruptcy under general order of reference, except as to questions arising out of the application of bankrupts for composition discharge. When the referee, acting as special master in the liquidation proceeding, ordered the arbitration, that was sufficient direction to the trustee to justify his proceeding accordingly under Section 26.

Three arbitrators were thereupon chosen absolutely in conformity with Section 26-b, and the finding of the arbitrators, which, by the way, was unanimous, was thereafter filed with the special master and the referee. While the petitioner has claimed in his fourth specification of error that the awards are void on their face, it has not seen fit to bring the awards before this court. They are, however, in evidence, and included in the transcript on appeal from the order disallowing petitioner's claim, and respondents, for their part, would be very glad to have this court refer to and consider them, if it cares to do so.

The action of the referee and the creditors in making the allowances herein complained of, is a full and sufficient confirmation and ratification of the acts of the trustee respecting arbitration, to remove any question of irregularity in the procedure, from an administrative standpoint.

*Shoe & Leather Reporter, et al., Petitioners,*  
129 Fed. 588 at p. 589 (C. C. A. 1st Cir.).

Had the petitioner desired to object at the time the arbitration was ordered, it should have then taken steps to review the order allowing arbitration, instead of proceeding in accordance therewith, submitting its case, and participating until the award, and objecting only when the award was rendered against it. It would be astounding for a court of equity to say that this petitioner, having submitted to an arbitration substantially in accordance with the statute, extending over a long period of time, involving many hearings and a large amount of money, and a corresponding amount of skill, time and attention on the part of all parties, should now, for unsubstantial irregularities, be able to avoid and set aside the entire proceeding. It seems clear that the provisions of Section 26-b and General Order 33 are purely of an administrative character, intended to guide the procedure, and that if there has been a substantial compliance therewith, one in the position of this petitioner has no ground for complaint.

So far as we can find from the reported cases, General Order 33 has never been cited, except once.

*Petition of Baxter*, 269 Fed. 344. (C. C. A. 6th Cir.)

That related to a composition, not an arbitration. The trustee's petition appears to have left certain matters to inference instead of setting them forth as required by the order, but the court held that

it was not for that reason jurisdictionally defective.

In

*Grant v. National Bank of Auburn*, 232  
Fed. 201 (D. C. New York),

a trustee in bankruptcy submitted a controversy to what, as the court said (p. 210), was "little more than an arbitration." The decision was in favor of the trustee, and on appeal it appears to have been attacked on every possible ground. It does not appear that any compliance was had with the requirements of Section 26 and Rule 33, and yet no suggestion is made that the proceedings were in any way impaired or affected by failure to conform thereto.

Petitioner refers to

*United States Fidelity & Guaranty Company v. Bray*, 225 U. S. 205, 56 L. Ed.  
1055,

and quotes at length therefrom in its brief (pp. 14 and 15). We are unable to see that this case has any application to the present discussion. There was presented a question of jurisdiction on the part of another court than the court of bankruptcy to control and decide upon the priority of distribution of funds belonging to the estate and held in the hands of the bankruptcy court. Obviously such jurisdiction was beyond the power of the court attempting to exercise it.

But this case presents no such feature. There is no attempt on the part of some other court to dictate to the bankruptcy court what claims it shall



allow, or how it shall distribute its funds. The determination of questions affecting the amount of petitioner's claim was not an interference with the jurisdiction of the court of bankrupt to pass on that claim and determine its status in the bankruptcy proceedings when presented for proof, whether those issues were decided by arbitration pursuant to the provisions of Section 26 of the Bankruptcy Act, or by liquidation proceedings under Section 63-b, which provides that they shall be "in such manner as the court may direct," and it has been held, may be carried on in any court of competent jurisdiction including the court of a state.

Collier on Bankruptcy, 11th Ed. p. 977.

*In re United Button Co.*, 140 Fed. 495 (D. C. Del.).

*In re Buchan's Soap Corporation*, 169 Fed. 1017 (D. C. N. Y.).

*In re Ellsworth*, 277 Fed. 128 (D. C. Wn.).

*Farish Co. v. South Side Trust Co.*, 281 Fed. 825 (C. C. A. 3rd Cir.).

*In re Edelen*, 248 Fed. 580 (D. C. Ky.).

*In re Heim Milk Product Co.*, 183 Fed. 787 (D. C. New York).

In the last case the court said:

"If unliquidated, as this claim seems to be, it may be liquidated by agreement *or arbitration*, if the trustee consents, or suit, as the court, that is, the referee, if the case has been referred, shall direct." (Our italics).



Certainly the *Bray* case can have no application here, where the entire proceedings were carried on under the direction and control of the referee in bankruptcy.

It is also claimed that the reference to a special master operated to prevent a submission of any question to arbitration, although the contract of the parties involved in the liquidation specifically provided for such submission. The first answer to this is that the petitioner, by acquiescing in the ruling directing arbitration as to extras, and proceeding in accordance therewith, is now estopped to question it. On October 26th, 1920, after hearing the arguments for and against the trustee's demand for arbitration upon the question of extras, the master ruled in favor thereof. At this point it was open to the petitioner, and was in fact, its duty, if it desired to contest this ruling, to then apply to the District Court for instructions to the master, reversing his ruling and withdrawing the matter of extras from arbitration, as, if petitioner was right, a long, difficult and expensive proceeding before the arbitrators would have been avoided.

*Pennsylvania Steel Co. v. New York City Ry.*, 182 Fed. 155 at p. 160 (Circuit Court, S. D. New York).

"If the master erred by an improper rejection of testimony offered by the defendant at the hearing before him, his error was one to be at once corrected by motion to the court for an order to compel him to receive the

evidence, and is not the subject of an exception to his report. *Schwarz v. Sears*, Walk. (Mich.) 19; *Ward v. Jewett*, Id. 45; *Nail Factory v. Corning*, 6 Blatchf. 333."

*Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476 (Circuit Court, S. D. N. Y.).

See also:

*In re Thomas*, 35 Fed. 337 (S. C.)

*Bates Refrigerating Co. v. Gillette*, 28 Fed. 673 (N. J.)

*In re Bacon*, 159 Fed. 424 (C. C. A. 2nd Cir.).

*In re Hollingsworth & Whitney Co.*, 242 Fed. 753 at 760 (C. C. A. 1st Cir.)

Instead of attempting to correct the error now alleged to have been made at that time, before the arbitrators were selected, the petitioner proceeded with the arbitration, which occupied several months, and as petitioner admits, involved services from the arbitrators of the reasonable value of \$3,000 each. It presented its case and participated in the proceedings until the award, which was unanimous. It strove for a favorable decision on the merits of its contention, and had it been successful, it would, of course, now maintain that that proceeding was final and conclusive.

In the next place, Judge Neterer, who made the order of reference, intended no such limitation as is now contended for by petitioner, for he has approved by his decree, adopting and confirming the

report of the master, all that was done by the latter, including the submission to arbitration.

Finally, in answer to this contention, we submit that if the reference to the special master was under the Bankruptcy Act, as petitioner claims, then the provisions of Section 26 of the Act, authorizing such an arbitration, cover the case, and support the arbitration. If, on the other hand, the matter be regarded as a liquidation proceeding, outside of the bankruptcy court or bankruptcy proceeding, then the arbitration may be equally sustained by the contract of the parties. The master was bound to adjudicate the rights of the parties upon the same basis as the court, had it reserved to itself jurisdiction of the liquidation. If arbitration was demandable under the contract, the appointment of the master did not deprive either of the parties of the right thereto, but they were entitled to the enforcement of this provision from the master the same as from the court. Stipulations for arbitration, such as was here enforced, submitting a limited question to arbitration, and not ousting the jurisdiction of the court entirely, are valid and enforceable, and it was competent for the court to give effect to the provisions of the contract as a common law arbitration.

*Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787 (D. C. New York).

*Memphis Trust Co. v. Brown-Kechum Iron Works*, 166 Fed. 398 (C. C. A. 6th Cir.).

“Arbitrators are judges chosen by the par-

ties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity.”

*Burchell v. Marsh*, 58 U. S. 344, 15 L. Ed. 96.

*Burrell v. United States*, 147 Fed. 44 (C. C. A. 9th Cir.).

*School District v. Sage*, 13 Wash. 352, 43 Pac. 341.

*Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31.

*Herrin, Hall, Marvin Safe Co. v. Purcell Safe Co.*, 81 Wash. 592.

*Dickey Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316.

*Martin v Vansant*, 99 Wash. 106.

After a final award, parties are bound by the arbitration.

5 Corpus Juris, 56, paragraph 103, and cases cited.

An award once made becomes conclusive upon the parties in the absence of a showing of fraud, undue influence or arbitrary action.

*Burchell v. Marsh*, *supra*.

*Reedy v. Scott*, 90 U. S. 352, 23 L. Ed. 109.

*Martinsburg & P. R. R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255.

*Burrell v. United States*, 147 Fed. 44 (C. C. A. 9th Cir.).

*Toledo S. S. Co. v. Zenith Transportation Co.*, 184 Fed. 391 (C. C. A. 6th Cir.).



The courts will not allow a party to speculate upon the results of the arbitration. If he goes to trial before arbitrators, and takes his chances of a favorable award, he is conclusively bound by an award against him.

*Hewitt v. Lehigh & H. River R. Co.*, 57 N. J. Eq. 511; 42 Atl. 325.

*Bingham v. Guthrie*, 19 Pa. 418.

*Williams v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290, 47 L. R. A. N. S. 337.

In his decision confirming the master's report (284 Fed. 277), Judge Neterer sustained the arbitration under the Bankruptcy Act, and suggested that under the decisions of the Supreme Court of the State of Washington, there could be no valid common law arbitration, and no statutory arbitration save through the medium of the state courts. But in this regard we respectfully submit that Judge Neterer overlooked the point that arbitration goes to the remedy and not to the right, and that in such matters the Federal Court is not governed by the laws or decisions of the states, but follows its own procedure, which, as the cases above establish, sanctions such arbitration as has been had in this case.

*Hamilton v. Home Insurance Co.*, 137 U. S. 370, 34 L. Ed. 708.

*United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006.

*Meacham v. Jamestown F. & C. R. Co.*, 211



N. Y. 346; 105 N. E. 653; Ann. Cas. 1915 C. 851.

*The Eros*, 241 Fed. 186 (D. C. N. Y.).

If the reference to the special master was outside the bankruptcy proceeding, it was nevertheless in the federal court, and the arbitration is sustainable under the contract between the parties.

On review, the respondent may rely any ground disclosed by the record sustaining the decision.

*Davis v. Crompton*, 158 Fed. 735 (C. C. A. 3rd Cir.).

4 Corpus Juris, 661, paragraph 2556.

Petitioner has cited

*District of Columbia v. Bailey*, 171 U. S. 161, 43 L. Ed. 118, petitioner's brief, p. 17,

and a number of other cases, where the submission to arbitration was avoided because of want of authority of a party to enter into the contract. Such cases have no bearing here because the trustee as such had power to submit the controversy to arbitration under Section 26 of the Bankruptcy Act, while the contract between the parties providing for arbitration was made by the bankrupt when it was an active, going concern, with full power to make such a contract. Whether the arbitration be rested on the contract, therefor, or on the act of the trustee, it was, in either case, competently authorized.

We should not lose sight of the fact that these arbitrators were not parties to the bankruptcy pro-

ceeding, and it would be a harsh injustice to charge them strictly with notice of the technical legal complexities of the case, or the result thereof as bearing on their authority to act. All they knew was that they were employed by the trustee and the respondent to settle certain differences between the parties, as arbitrators. The petitioner did not raise with them the question of their authority. The arbitrators dealt with the parties on the basis on which the matter was submitted to them. They rendered their services in good faith, and it would be grossly unjust and inequitable to now refuse them what is admittedly just compensation for what they have done. The respondents urge that the petition be denied.

Respectfully submitted,

IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

*Attorneys for Respondents  
and Appellees.*

United States

Circuit Court of Appeals

For the Ninth Circuit.

---

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA, and  
MARK SHELDON, as Commissioner for the  
COMMONWEALTH OF AUSTRALIA,  
Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as  
Trustee in Bankruptcy of PATTERSON-  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Western District of Washington, Northern Division.

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FILED

FEB 5 - 1923

F. D. MCKAY

CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA, and  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names and Addresses of Counsel.**

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H. B. JONES, Esq., Attorney for Appellees, 612 Colman Building, Seattle, Washington. [1\*]

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In the District Court of the United States for the Western District of Washington, Northern Division.

6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

### **Order of Adjudication.**

At Seattle, in said District, on the nineteenth day of March, 1920, before the Honorable Jeremiah Neterer, Judge of said Court of Bankruptcy, the

petition of Patterson-MacDonald Shipbuilding Company, a corporation, that it be adjudged a bankrupt within the true intent and meaning of the Act of Congress relating to bankruptcy, having been heard and duly considered, said Patterson-MacDonald Shipbuilding Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

WITNESS the Honorable JEREMIAH NETERER, Judge of said Court, and the seal thereof at Seattle, in said District, on the nineteenth day of March, 1920.

F. M. HARSHBERGER,  
Clerk.

By P. A. Page,  
Deputy.

ENTER: JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [2]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.



**Order of Reference.**

WHEREAS, the Patterson-MacDonald Shipbuilding Company, a corporation, of Seattle, in the County of King, and District aforesaid, was on the nineteenth day of March, 1920, duly adjudged a bankrupt upon a petition filed in this court by it on the nineteenth day of March, 1920, according to the provisions of the Act of Congress relating to bankruptcy,

IT WAS THEREUPON ORDERED that said matter be referred to Cicero R. Hawkins, one of the referees in bankruptcy of this Court to take such further proceedings therein as are required by said Act; and that the said Patterson-MacDonald Shipbuilding Company shall attend the aforesaid referee on the 19th day of March, 1920, at his office, 1204, L. C. Smith Building, Seattle, Washington, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to the said bankrupt.

WITNESS the Honorable JEREMIAH NETERER, Judge of the said Court, and the seal thereof at Seattle in said District, on the nineteenth day of March, 1920.

F. M. HARSHBERGER,  
Clerk.

By P. A. Page,  
Deputy.

ENTER: JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1920. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [3]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Order for Disbursement.**

At a meeting of the creditors of the above-named estate duly and regularly held on the 14th day of February, 1921, it was decided that Mr. H. B. Jones, one of the attorneys for the trustee, and Mr. A. M. MacDonald, former vice-president and manager of the bankrupt corporation, should proceed to Washington, D. C., for the purpose of prosecuting and presenting the bankrupt's claim against the United States Shipping Board Emergency Fleet Corporation, and it appearing from the trustee's report that the necessary expenses of Mr. MacDonald will be the sum of \$1,000.00, and that the necessary expenses of Mr. Jones will be the sum of \$500.00;

IT IS ORDERED that the trustee pay by his check to be countersigned by the referee, to Bronson, Robinson & Jones, his attorneys, the sum of \$500.00 to cover the expenses of H. B. Jones' trip

to Washington, and that your trustee pay by his check to be countersigned by the referee, to Mr. A. M. MacDonald, the former vice-president and manager of the bankrupt corporation, the sum of \$1,000.00 on account of expenses and compensation for such trip; and it is further ordered that the said Bronson, Robinson & Jones, shall in due course, upon the completion of said trip of H. B. Jones, enter an accounting therefor.

Dated Feb. 16, 1921.

C. R. HAWKINS,  
Referee.

Approved:

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1921. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [4]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion,

Bankrupt.

**Order for Disbursement.**

At a meeting of creditors duly and regularly called for the purpose of considering, allowing and authorizing the payment of expenses of administration herein, the following disbursements hereinafter enumerated having been duly approved, authorized and ordered to be paid.

IT IS HEREBY ORDERED that the trustee execute and deliver his trustee's check, to be duly countersigned by the referee, to the following persons for the following items and amounts, to wit:

J. L. McLEAN:

Upon account trustee's fees and commissions .....	\$2,000
---------------------------------------------------	---------

A. M. MacDONALD:

Upon account of expenses and services rendered trustee .....	1,000
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BRONSON, ROBINSON & JONES:

Upon account of expenses and moneys advanced to A. M. MacDonald .....	\$1,150
-----------------------------------------------------------------------	---------

Upon account of trustee's attorneys' fees .....	3,500
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4,650    \$7,650

Dated at Seattle in said District June 1, 1921.

C. R. HAWKINS,  
Referee.

Approved:

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 1, 1921. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [5]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Order for Disbursement.**

At a meeting of creditors duly and regularly called for the purpose of considering, allowing and authorizing the payment of expenses of administration herein, the following disbursements hereinafter enumerated having been duly approved, authorized and ordered to be paid,

IT IS HEREBY ORDERED that the trustee execute and deliver his trustee's check, to be duly countersigned by the Referee, to the following persons for the following items and amounts, to wit:

SUNSKI BROS. & CO., hauling muffler from Patterson-Mac- Donald Shipyard to Smith's Cove Warehouse .....	\$ 13
------------------------------------------------------------------------------------------------------------------	-------

PORT OF SEATTLE:

Labor and storage of engines from June 30, 1921, to July 29, 1921 .....	\$ 145.28
-------------------------------------------------------------------------------	-----------



Storage and cranage of muffler .....	4.80	
Labor and materials used in building sheds for protection of machinery .....	43.39	193.47
MOORE & BOOTHE, services performed May 13, 1921 to September 21, 1921		1,372.90
A. M. MacDONALD:		
Advance on expenses to trip to Washington, D. C. ....	\$1,500	
On account for services rendered trustee and estate .....	1,500	3,000
[6]		
BRONSON, ROBINSON & JONES:		
Advance for expenses of Mr. Jones on trip to Washington, D. C. ....	\$1,500	
For various sundry charges as per bill rendered .....	594.67	\$2,094.67
ROBERT MUIR, preparation of engineering data in connection with various claims .....		100
OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY:		
Rental on tracks from June 1 to June 30, 1921..	\$29.61	

Rental on tracks from		
July 1 to July 31, 1921	30.60	
Rental on connection and		
extension of spur from		
June 1 to June 30, 1921	6.47	
Rental on connection and		
extension of spur from		
July 1 to July 31,		,
1921 .....	6.69	73.37

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N. W. BOLSTER & CO., re-	
porting and transcribing	159

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\$7,006.41.

Dated in Seattle in said District October 7th,  
1921.

C. R. HAWKINS,  
Referee.

Approved:

EDWARD E. CUSHMAN,  
Judge.

[Indorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division, Oct. 7, 1921. F. M. Harshberger, Clerk.  
By P. A. Page, Deputy. [7]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Referee's Certificate of Review.**

I, C. R. Hawkins, one of the referees of this court in bankruptcy, do hereby certify that during the course of the administration of said matters before me an order was made allowing A. M. MacDonald the sum of \$20,000.00 in full for his services rendered and expenses incurred in behalf of the trustee in the liquidation of the claim of the bankrupt against the United States Shipping Board Emergency Fleet Corporation, and for his services rendered the trustee in connection with the liquidation of the unliquidated claim asserted against said estate by the Australian Government in the sum of \$1,100,000.00, and for other services rendered in connection with the administration of said estate.

The said MacDonald having previously been paid the sum of \$6,500.00 on account of said services and expenses, the trustees was by said order directed to pay said MacDonald the sum of \$13,500.00 being the balance of said allowance.

The Australian Government, represented by its attorneys Messrs. Shark, Belt & Fairbrook, feeling

aggrieved at said order filed its petition for review thereof, which was granted.

The six alleged errors of the referee in making the ruling and order complained of, which are set out in paragraph V of the petition for review, present, I think, only two questions for review: [8]

1. Can an officer of a bankrupt corporation be reimbursed for expenses incurred and services rendered to the trustee of the bankrupt estate at the request of the trustee and creditors or must such services as was rendered by Mr. MacDonald in this case be and remain uncompensated and the expenses incurred in rendering that service be paid from his personal funds?

2. Was the allowance made to said MacDonald in the order complained of excessive?

The facts pertinent to a consideration of the questions herein presented are briefly as follows:

That at the request of the trustee and with the knowledge and consent of the creditors, Mr. A. M. MacDonald left his home in the City of Seattle, journeyed with Mr. H. B. Jones, one of the attorneys for the trustee, to Washington, D. C., for the purpose of presenting and prosecuting the claim of the bankrupt corporation against the United States Shipping Board Emergency Fleet Corporation; that in the prosecution of that undertaking Mr. MacDonald made two trips from Seattle to Washington, D. C., and spent the greater portion of the year in the prosecution of said claim against the Emergency Fleet Corporation; that as a result of the efforts of the attorneys for the trustee and

said MacDonald, the trustee received in settlement the sum of \$277,000.00 in cash and other considerations amounting to approximately \$50,000.00.

It was at all times during the prosecution of said claim represented to the referee and the creditors by the trustee and his counsel that the services of Mr. MacDonald were absolutely essential to the successful preparation and prosecution of said claim and at the creditors' meeting at which the order complained of was made, it was stated to the creditors by counsel for the trustee that a large portion of the amount realized by the [9] trustee in the settlement of said claim would have been sacrificed and lost to the creditors but for the services of Mr. MacDonald. The creditors, including the Australian Government, were at all times kept fully advised of the services being rendered by Mr. MacDonald and the apparent necessity for his presence in Washington, and from time to time consented at creditors' meetings to payments being made to him by the trustee to apply on account of his said services and expenses, and payments were authorized by the creditors and made on account thereof aggregating \$6,500.00.

Under such circumstances it was idle, in my judgment, to contend that no compensation would be paid on account of the services rendered because Mr. MacDonald was a stockholder and officer of the bankrupt corporation.

If the services of one stockholder, an officer, such as was rendered by Mr. MacDonald in this case, could be required by the trustee and the bene-



fits thereof received and retained by the creditors without compensation, there would be no reason why the trustee might not require such service or even more service from any and all stockholders and officers of the corporation without compensation.

I recognize the right of the trustee to require from the bankrupt or the officers of a bankrupt corporation such information as will enable him to properly administer the estate, but I do not understand that he can require and receive such extensive services as were rendered without fair and adequate compensation being paid therefor.

On the question of whether or not the amount allowed was excessive I do not care to say anything except that Mr. MacDonald presented a claim to the trustee for \$7,406.00 for his expenses and \$20,000.00 for his services. The trustee made [10] this letter or demand a part of his report, and notice was mailed to all the creditors advising them of the claim presented by MacDonald and that the same would be considered at the creditors' meeting and an order made disposing of the same. Prior to the creditors' meeting I had given the matter considerable thought and at said meeting sought the opinion of the various creditors and attorneys present. No objection was made by any creditors except the Australian Government to the allowance of compensation to Mr. MacDonald and no one present at said meeting, except said creditor, objected to the amount of the allowance. I was of the opinion that Mr. MacDonald's claim for expenses was unreasonable and as there had been no

showing of the items of expense I did not attempt to make any specific allowance for expenses but considered it advisable to make him an allowance for his services only which was in my judgment sufficient to take care of any legitimate expenses.

In fixing this compensation I had in mind two things,—first, the capable, intelligent effort extended by Mr. MacDonald in behalf of the estate over the long period of time in the prosecution of the claim against the Emergency Fleet Corporation and the very satisfactory results of those efforts, also the excellent and capable service and the time spent in collecting data and preparing for the litigation in connection with the liquidation of the claim of the Australian Government.

It will be observed that in the petition for review it is alleged that no sworn statement of the services rendered or expenses incurred was ever filed by MacDonald in the bankruptcy proceedings. I refer to this simply to state that that matter was not called to the attention of the referee or the creditors at the time the matter was under consideration and no point was made concerning same by counsel for the objecting [11] creditor at that time and I do not think it can be a proper subject for review unless it had been called to the attention of the referee at the time the matter was under consideration and besides as has been above stated the trustee and the creditors, including the objecting creditor, was fully advised at all times of the services required by the trustee and rendered by the said MacDonald; was advised of the payment of \$6,-

500.00 on account thereof. Mr. MacDonald as well as the trustee and his counsel were at the meeting and answered all questions concerning same that were asked by creditors or the referee.

I sent up herewith as the record in this case.

1. Exhibit "D," which was annexed to the trustee's report made prior to the meeting at which the order complained of was made.

2. The order complained of.

3. The petition for review.

Dated at Seattle, in said District, this 9th day of September, 1922.

Respectfully submitted,

C. R. HAWKINS,

Referee in Bankruptcy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 9, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [12]

### **Exhibit "D."**

Seattle, Washington, July 20, 1922.

Mr. J. L. McLean, Trustee in Bankruptcy,

Patterson-McDonald Shipbuilding Company,

Seattle, Washington.

Dear Sir:

Having been engaged by you and your attorneys, at the time of your appointment as Trustee in Bankruptcy, to prosecute all claims for and against the Patterson-MacDonald Shipbuilding Company, I proceeded forthwith to assemble, first, documents,

data and so forth, necessary to enable me to intelligently carry on the large undertaking of properly establishing the claims of the Shipbuilding Company against the Australian Government and the United States Shipbuilding Board Emergency Fleet Corporation.

In the fall of 1920 arbitration proceedings were started with a view of adjusting the Company's claims against the Australian Government, which proceedings lasted until February, 1921. I then left for Washington, D. C., in company with Mr. H. B. Jones (of the firm of Bronson, Robinson and Jones, your attorneys) for the purpose of presenting the Company's claims against the Emergency Fleet Corporation. A great deal of detail work was necessary, as you can readily appreciate, before the matter was gotten into presentable form, but the work was more than justified in results obtained since the claims were allowed. The decision of the "Claims Commission" was for a cash payment in favor of the Company of three Hundred Fifty-three Thousand (\$353,000.00) dollars, Salvage materials valued at Seventy thousand (\$70,000.00) dollars and commitments to be assumed by the Emergency Fleet Corporation aggregating Forty Thousand (\$40,000.00) dollars. Total Four hundred sixty-three thousand (\$463,000.00) dollars.

On my return from Washington, arbitration proceedings with the Australian Government were continued and in July, 1921, the Board of arbitors rendered their unanimous decision in favor of the Shipbuilding Company. [13]



Notice was then received from the United States Shipping Board that a new "Claims Commission" had been appointed by the New Administration, which new Commission would reconsider all claims against the Emergency Fleet Corporation that had already been adjudicated; this necessitated, of course, the reopening of the Patterson-MacDonald case, a practical duplication of the work previously done and in addition the preparation and presentation of additional supporting evidence as called for by the New Commission; this together with matters pertaining to the Company's claims against the Australian Government, consumed the time to October, 1921; I again journeyed to Washington in the interests of the Company's case against the Emergency Fleet Corporation; this time, after many strenuous and anxious sessions with the "Claims Commission" a settlement was entered, which I consider a most satisfactory one for the Shipbuilding Company, whereby the claimant received a cash payment of Two hundred *seventy thousand* two hundred fifty-three & 74/100 dollars (\$277,253.74) and in addition to such cash payment the claimant to retain for its own use and benefit all moneys received for salvaged materials the estimated value of which is seventy thousand (\$70,000.00) dollars; and further, the Emergency Fleet Corporation to assume all commitments outstanding against the cancelled contract of the United States Shipping Board, amount approximating forty thousand (\$40,000.00) dollars making a total settlement of three hundred eighty-seven thousand two hundred fifty-



three & 74/100 dollars. The securing of the adjustment hereinabove recited and attending to all matters that came up in connection with our case until payment was finally made took the writer up until June of this year.

Up to date, my expenses on two trips to Washington, the one taking three and one-half months time and the other a little over eight months, together with four trips from Washington to New York, totals Seventy-four hundred and six (\$7406.00) dollars [14] in detail as follows:

Railroad fares:

Two round trips Seattle to Washington, D. C. ....	\$ 700.00
Four round trips Washington, D. C., to New York .....	116.00

Hotel expenses:

Including meals, miscellaneous and incidental items 345 days @ \$19	6,555.00
Stenographic services .....	35.00
<hr/>	
Total .....	\$7,406.00

I have received from you through the Court to apply on my expense account payments as follows:

February, 1921 .....	\$1000.00
April 25th, 1921 .....	1000.00
June 1st, 1921 .....	1500.00
October 5, 1921 .....	3000.00
<hr/>	

Total ..... \$6500.00

This leaves a balance unpaid, due me on expense account of nine hundred and six (\$906.00) dollars.

The work that you engaged me to perform is practically finished and I hereby make a formal request of you at this time for a payment of Twenty Thousand (\$20,000.00) Dollars, on account, for services rendered during the two years and four months last past.

Should you at any time find that you again need my services I shall be only too pleased to render all assistance possible.

Yours truly,

A. M. MacDONALD.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 9, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [15]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

**Order for Disbursement.**

WHEREAS, at a creditors' meeting, duly called and held on Friday, August 18th, 1922, at the hour of two o'clock P. M., at the office of the Referee in Bankruptcy, 1204 L. C. Smith Building, Seattle, Washington, the claim of A. M. MacDonald for

allowance and payment on account of expenses incurred and services rendered on behalf of the trustee in connection with the prosecution of the claim of the bankrupt against the United States Shipping Board Emergency Fleet Corporation, and litigation with the Australian Government, and investigation and settlement of claims against the bankrupt, was duly considered and passed upon, and a total allowance made to him therefor of \$20,000, covering such services and expenses, whereof he has heretofore been paid the sum of \$6,500,—

NOW, IT IS HEREBY ORDERED that the trustee be and he is hereby authorized and directed to pay to said A. M. MacDonald by his check as trustee herein, to be duly countersigned by the Referee, the sum of \$13,500.00.

Dated at Seattle, in said District, this 23 day of August, 1922.

C. R. HAWKINS,  
Referee.

Approved:

\_\_\_\_\_,  
Judge. [16]

In the District Court of the United States for  
the Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

**Petition for Review Regarding Paying Claim of  
A. M. MacDonald for Services.**

The petition of the Commonwealth of Australia respectfully represents:

FIRST: That heretofore on July 31, 1920, this petitioner duly presented its secured claim against the said bankrupt founded upon various breaches of a contract for the building by the bankrupt of ten ships for the petitioner, which said claim is now in process of adjudication, and this petitioner is a creditor of the said bankrupt having a provable claim against the said bankrupt's estate.

SECOND: That at a meeting of the creditors of the said bankrupt held on the 18th day of August, 1922, there was presented a claim of A. M. MacDonald for expenses and services rendered in connection with administering the estate of the said bankrupt, and that the said claim was, over the objection of this petitioner, allowed as an expense of administering the said estate in the sum of \$13,500.00, and thereafter upon the 23d day of August, 1922, an order was entered by the Honorable C. R. Hawkins, referee in bankruptcy, authorizing the payment of said claim, the same also being entered over the objection of this petitioner.

THIRD: That no sworn statement of services rendered, or of expense occurred, was ever filed in the said cause by the said A. M. MacDonald, or on his behalf; and the only representation which formed the basis of the said claim was [17] contained in the petition of the trustee filed herein to the effect



that he had employed the said A. M. MacDonald to assist him in presenting a claim against the United States Shipping Board, Emergency Fleet Corporation, which said claim has been approved by the said Emergency Fleet Corporation and paid in the sum of something over \$277,000.00, and also in contesting the claim of this petitioner.

FOURTH: That it further appeared that the said A. M. MacDonald was at the time of the adjudication in bankruptcy vice-president and general manager of the said bankrupt, and that the sole services rendered by the said A. M. MacDonald consisted in furnishing the trustee of the bankrupt with all necessary information for the presentation of the said claim against the United States Shipping Board, Emergency Fleet Corporation and in contesting the claim of this petitioner.

FIFTH: This petitioner claims that the said ruling and order of the said Referee is erroneous for the following reasons:

1. There was no sworn statement, either oral or written, and no itemized statement of any kind made to form the basis of any claim herein as required by the bankruptcy act and the rules, and the practice of this court.

2. That there is no segregation in the order of the items, so it is impossible to determine how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.



3. That the said trustee or his attorneys were never authorized either by the Referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatsoever for services to be rendered by [18] the said A. M. MacDonald.

4. That the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the Bankruptcy Act.

5. That it is contrary to the letter and spirit of the Bankruptcy Act and the rules and the practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

6. That the said allowance is excessive.

SIXTH: That this petitioner desires a review by the Judge of this court of the said order made by the said referee, and files this petition therefor, and he therefore prays that the order complained of and the question of law and fact raised before the said Referee and decided by him may be certified by the said referee to the District Judge of this court that he may review the said order heretofore made and make an order setting aside the said order of payment, and that the said sum of money and no part thereof be paid, and your petitioner ever prays.

COMMONWEALTH OF AUSTRALIA,

By SHANK, BELT & FAIRBROOK,

Its Counsel.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Sep. 9, 1922. F. M. Harshberger, Clerk.  
By P. A. Page, Deputy. [19]

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In the District Court of the United States for  
the Western District of Washington, Northern  
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

**Order on Petition for Review on Allowance to  
A. M. MacDonald.**

This cause came on to be heard at this term upon the petition of Mark Sheldon, as Commissioner for the Commonwealth of Australia and the Commonwealth of Australia, to review an order made and entered by the Referee herein upon the 23d day of October, 1921, allowing and ordering payment to A. M. MacDonald of the sum of Thirteen Thousand Five Hundred Dollars (\$13,500.00), and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED and DECREED that said petition be and it hereby is denied, and the said order be and it is hereby approved, confirmed and sustained, in every respect.

Done in open court this 26 day of October, 1922.

JEREMIAH NETERER,  
Judge.

To the foregoing the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, excepts, and their exception is allowed.

Oct. 26, 1922.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [20]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

Appellees.

**Petition for Appeal.**

And now come the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, claimants in the above-mentioned proceeding, and say that on or about the 26th day of October, 1922, the said District Court entered an order herein in favor of the said appellees, A. M. MacDonald and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt, and against these appellants, wherein it denied the petition of these appellants to review an order made and entered herein by the referee allowing and ordering payment to the said A. M. MacDonald of the sum of \$13,500, and approving the said payment, in which order and the said proceedings had prior thereto in this cause certain errors were committed to the prejudice of these appellants [21] all of which more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, these appellants hereby appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said assignment of errors, and pray that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 3d, 1922.

SHANK, BELT & FAIRBROOK,  
Attorneys for Appellants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [22]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for the  
Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as  
Trustee in Bankruptcy of PATTERSON-  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt.

Appellees.

**Assignment of Errors.**

And now come the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, the claimants in the above-mentioned proceedings, and in connection with their appeal from the order entered in the above-entitled court and cause on the 26th day of October, 1922,



approving the order of the referee ordering the payment to A. M. MacDonald of the sum of \$13,500.00, assign the following errors to be relied upon in their said appeal:

First. The Court erred in overruling the motion of these claimants to require the referee's certificate herein to be made more definite.

Second. The Court erred in not sustaining the objections of these claimants to the said order of the said referee [23] on the ground that there was no segregation in the order of the items so that it was impossible to determine from the said order how much was allowed the said A. M. MacDonald for expenses actually incurred and how much for services rendered, or how much was allowed the said A. M. MacDonald for each service rendered.

Third. The Court erred in not sustaining the objections of these claimants to the said order of the said referee on the ground that the said John L. McLean, trustee in bankruptcy, nor his attorneys, were never authorized either by the referee or the creditors of the said bankrupt to agree, either expressly or impliedly, to pay the said A. M. MacDonald any sum whatever for services to be rendered by the said A. M. MacDonald.

Fourth. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said A. M. MacDonald rendered no services whatsoever other than what he was expressly required to render under the bankruptcy act.

Fifth. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that it is contrary to the letter and spirit of the bankruptcy act and the rules and practice of this court to pay an officer of the bankrupt for imparting information regarding the business matters and affairs of the bankrupt.

Sixth. The Court erred in not sustaining the objections of these claimants to said order of the said referee on the ground that the said allowance is excessive.

Seventh. The Court erred in approving the order of the referee ordering payment to the said A. M. MacDonald in the sum of \$13,500.00.

SHANK, BELT & FAIRBROOK,  
Attorneys for Claimants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [24]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. MacLEAN, as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.

**Order Allowing Appeal.**

The Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, having presented their petition for an appeal from the order heretofore entered in the above-entitled court and cause on the 26th day of October, 1922, denying the petition of said appellants to review an order made by the referee herein allowing and ordering payment to the said A. M. MacDonald of the sum of \$13,500, and approving the said payment and an assignment of errors ac-

companying the same, and it appearing to the court that such petition should be allowed,

This Court does hereby allow the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit upon the filing of a bond in the sum of \$1,000, with good and sufficient surety to be approved by the Court, said bond to be conditioned and to operate as both a cost and supersedeas bond.

Done in open court this 3d day of November, 1922.

JEREMIAH NETERER,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [25]

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### **Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, as principals, and the National Surety Company of New York, as surety, are held and firmly bound unto A. M. MacDonald and John L. McLean, as Trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, in the full and just sum of one thousand dollars (\$1,000.00), to be paid to the said A. M. MacDonald and John L. McLean, as trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, for the payment

of which well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 3d day of November in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, lately in the District Court of the United States for the Western District of Washington, Northern Division, in an action pending in said court in bankruptcy, entitled "In the matter of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt," an order was made and entered against the said principal obligors and in favor of the said obligees allowing and ordering payment to said A. M. MacDonald and approving said payment in the sum of \$13,500.00, and the said principal obligors have sued out an appeal therefrom.

Now, the condition of the above obligation is such that if the said Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

COMMONWEALTH OF AUSTRALIA,  
And MARK SHELDON,  
As Commissioner for the Commonwealth of Australia,

By SHANK, BELT & FAIRBROOK,

Their Attorneys.



[Corporate Seal]

NATIONAL SURETY COMPANY,  
ROBERT WHYTE,

Attorney-in-fact. [26]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 3, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [27]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. MacLEAN,  
as Trustee in Bankruptcy of PATTERSON—  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt,

Appellees.

### **Statement of Evidence.**

At a meeting of the creditors of the Patterson-MacDonald Shipbuilding Company, a corporation,

Bankrupt, held in August 18, 1922, at two o'clock P. M., before the Honorable Cicero R. Hawkins, Referee in Bankruptcy, there were present the Referee, the Trustee, Mr. N. B. Jones, Attorney for the Trustee, Mr. Corwin S. Shank, attorney for the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, Mr. A. M. MacDonald, and other parties interested. The following proceedings were had:

“Mr. JONES.—The Trustee has also reported a letter from Mr. MacDonald. I haven't a copy, but it is in the original files—that I think I had better read. It is set up as Exhibit D to the Trustee's report.”

Thereupon Mr. Jones read said letter from Mr. MacDonald.

Mr. JONES.—“I want to say, on behalf of the Trustee, that Mr. MacDonald has performed very valuable services for the estate. When we [28] took this thing up first, the Shipping Board claim stood almost at zero, and it was necessary to have recourse to Mr. MacDonald's information and services to establish this claim, and also in connection with the arbitration, and his services have been invaluable to the estate in that regard and absolutely necessary to the proper prosecution of the claim against the Shipping Board and the resistance of the claim of the Australian Government. He has been, you might say, the encyclopedia to which we have had to refer at all times for information.

Mr. SHANK.—If the Court please, in behalf of the Commonwealth of Australia, I desire to interpose an opposition to the allowance of any sum whatsoever to Mr. MacDonald, first, because he was never employed to render any service; second, that what he has done has simply been the duty that he owed to the creditors to furnish all information which he possessed as an officer of the corporation; third, that the amount asked for is excessive.”

Upon the hearing before the Judge, answers to following questions were stipulated in open court as true:

1. Was the said A. M. MacDonald a stockholder, officer or chief managing agent of the bankrupt at or prior to the adjudication of bankruptcy of the said bankrupt? Answer: Yes.

2. Was there any sworn statement, either oral or written, made regarding the nature of the services rendered by the said A. M. MacDonald to the said bankrupt's estate? Answer: No.

3. Was there any segregation in the allowance for payment of expenses necessarily incurred and for services, and if so give such segregation?

Answer: None but letter.

4. Was there any segregation of allowances for services rendered in the matter of presenting the claim of the bankrupt's estate against [29] the United States Emergency Fleet Corporation, and in the matter of contesting the claim of the Commonwealth of Australia, and if there was any such segregation what was the allowance for each item? Answer: No segregation.

5. Is it a fact that in the event of the claim of the Commonwealth of Australia being rejected there will be a substantial sum of money left, after paying all claims of creditors, to be returned to the bankrupt corporation?      Answer: Yes.

Furthermore, at the hearing before the Judge, it was ordered orally by the court that Mr. MacDonald should file an affidavit to be considered a part of the record, which affidavit, omitting formal parts, is as follows:

“A. M. MacDonald, being first duly sworn, on oath, deposes and says: that in response to the demand of Mr. Corwin S. Shank, attorney for the Commonwealth of Australia, and the instructions of the court, for submission of a sworn statement in support of his claim for compensation for services and expenses in the above matter, he does hereby refer to and adopt, and by this reference make a part of this affidavit as fully as if set forth at length herein, his letter of July 20, 1922, addressed to Mr. J. L. MacLean, trustee in bankruptcy of the above estate, and does hereby under oath state that the facts set forth in said letter are true and correct, except as hereinafter modified; and affidavit does further state in reference to this matter as follows:

I left Seattle for Washington, D. C., February 18th, 1921, getting back to Seattle May 28th, 1921. .

I again left for Washington, D. C., October 25th, 1921, getting back to Seattle July 4th, 1922, making a total of 351 days, 16 of these days being consumed on train. [30]

These trips each way cost \$214.50 per trip, which included railroad fare, Pullman, meals and tips. The four trips totaled.....\$ 858.00  
Hotel and other expenses incurred on trip

as follows:

Hotel, 335 days at \$7.00 per day..... 2,345.00

Meals at \$5.50 per day..... 1,842.50

Tips \$2 per day ..... 670.00

Other miscellaneous expenses including luncheons, dinners, laundry, automobiles, etc., at \$4.50 per day.

This makes a total of \$19.00 per

day ..... 1,507.50

Four trips from Washington to New

York ..... 116.00

Stenographic services ..... 35.00

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\$7,374.00

A. M. MacDONALD." [31]



In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. MacLEAN, as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.

**Certificate to Statement of Evidence.**

It appearing that the within and foregoing statement of evidence was lodged in due time with the clerk of this Court and that due and proper notice of such lodgment and of the time and place of the proposed settlement thereof was given to the attorneys for the appellees, and it appearing that the said statement is true, complete and properly prepared, it is therefore

ORDERED that the same be approved and settled and approved as a true, complete and properly prepared statement of the evidence introduced in said cause reduced to narrative form.

Dated this 22d day of January, 1923.

JEREMIAH NETERER,  
District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [32]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for  
the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. MacLEAN,  
as Trustee in Bankruptcy of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees,

**Praeceptum for Record on Appeal.**

To F. M. Harshberger, Clerk of said court:

Will you kindly incorporate into the transcript of the record upon the appeal of the above-named appellants from the order entered in said court and cause upon the 26th day of October, 1922, allowing and ordering payment to A. M. MacDonald of the sum of \$13,500.00, the following portions of the record, to wit:

- (1) Order of adjudication of bankruptcy.
- (2) Order of reference.
- (3) Referee's certificate on review regarding compensation to A. M. MacDonald.
- (4) Order of reference making allowance to said A. M. MacDonald which was sent up accompanying the said referee's certificate.
- (5) The petition of these appellants for review of [33] said order which was also sent up accompanying the said referee's certificate.
- (6) Order of the Court entered October 26, 1922, denying these appellants' petition and approving the order of the referee.
- (7) Petition for appeal from said order.
- (8) Assignment of errors accompanying said petition.
- (9) Order allowing said appeal.
- (10) Bond on said appeal.
- (11) Citation on said appeal.
- (12) Statement of evidence upon said appeal.

Dated this 17th day of November, 1922.

SHANK, BELT & FAIRBROOK,

Attorneys for said Appellants.

Service of the within paper is hereby admitted  
this 17th day of Nov. 1922.

BRONSON, ROBINSON & JONES,  
Attorneys for Appellees.

[Indorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division. Nov. 20, 1922. F. M. Harshberger,  
Clerk. By P. A. Page, Deputy. [34]

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In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

THE COMMONWEALTH OF AUSTRALIA and  
MARK SHELDON, as Commissioner for the  
Commonwealth of Australia,  
Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as  
Trustee in Bankruptcy of PATTERSON-  
MacDONALD SHIPBUILDING COM-  
PANY, a Corporation,  
Appellees.

**Appellee's Praecept for Additional Portions of Rec-  
ord on Appeal.**

To the Clerk of the Above-entitled Court:

Will you kindly incorporate into the transcript

of the record upon appeal of the above-entitled matter the following, to wit:

- (1) Order of disbursement dated October 7th, 1921.
- (2) Order of disbursement dated June 1st, 1921.
- (3) Order of disbursement dated February 16th, 1921.

BRONSON, ROBINSON & JONES,  
Attorneys for Appellees.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [35]

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In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

THE COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia,

Appellants,

vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON—MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Appellees.



**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 35, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for [36] the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the petitioners and appellants herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return	82 folios	
at 15c .....		\$12.30
Certificate of Clerk to transcript of Record,		
4 folios at 15c .....		.60
Seal to said certificate .....		.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$13.10, has been paid to me by attorneys for appellants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 24th day of January, 1923.

[Seal] F. M. HARSHBERGER,  
Clerk United States District Court, Western District of Washington. [37]

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**Citation.**

The United States of America,—ss.

To A. M. MacDonald and to John L. McLean, as  
Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation,  
Bankrupt:

You are hereby notified that in a certain cause in bankruptcy in the United States District Court of the United States for the Western District of Washington, Northern Division, entitled "In the Matter of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt," an appeal has been allowed the Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, claimants therein, to the United States Circuit Court of Appeals for the Ninth Circuit, and

you are hereby cited and admonished to be and appear in said court at San Francisco on or before the 1st day of December, 1922, to show cause, if any there be, why the order appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 3d day of November, A. D. 1922.

JEREMIAH NETERER,  
United States District Judge. [38]

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt (A. M. MacDonald). Citation. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 9, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Service of the within paper is hereby admitted this 3d day of November, 1922.

BRONSON, ROBINSON & JONES,  
Attorneys for Appellees.

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[Endorsed]: No. 3978. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, Appellants, vs.

A. M. MacDonald and John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 26, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States for the  
Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corporation,  
Bankrupt.

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,

vs.

A. M. MacDONALD et al.,  
Appellees.

**Order Extending Time to and Including January  
29, 1923, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in open court, and good and sufficient cause having been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that the said appellants, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, be and they hereby are allowed additional time up to and including the 29th day of January, 1923, in which to file in the United States Circuit Court of Appeals for the Ninth Circuit the record in this cause, being the appeal of the said appellants from the decree entered herein on the 26th day of October, 1922, in favor of the said appellees.

Done in open court this 23d day of January, 1923.

JEREMIAH NETERER,  
District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Company, Bankrupt. Order Extending Time.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt.

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,

vs.

A. M. MacDONALD et al.,

Appellees.



**Order Extending Time to and Including January 20, 1923, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in open court, and good and sufficient cause having been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that the said appellants, Commonwealth of Australia and Mark Sheldon, as Commissioner for the Commonwealth of Australia, be and they hereby are allowed additional time up to and including the 20th day of January, 1923, in which to file in the United States Circuit Court of Appeals for the Ninth Circuit the record in this cause, being the appeal of the said appellants from the decree entered herein on the 26th day of October, 1922, in favor of the said appellees.

Done in open court this 11th day of December, 1922.

JEREMIAH NETERER,  
District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding Co., etc., Bankrupt. Commonwealth of Australia et al., Appellants. A. M. MacDonald et al., Appellees. Order Extending Time. Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 11, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy.

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD  
SHIPBUILDING COMPANY, a Corpora-  
tion, Bankrupt,

COMMONWEALTH OF AUSTRALIA et al.,  
Appellants,

vs.

A. M. MacDONALD et al.,

Appellees.

**Order Extending Time to and Including December  
22, 1922, to File Record and Docket Cause.**

Upon agreement of counsel for both parties in  
open court, and good and sufficient cause having  
been shown, it is hereby

ORDERED, ADJUDGED AND DECREED that  
the said appellants, Commonwealth of Australia  
and Mark Sheldon, as Commissioner for the Com-  
monwealth of Australia, be and they hereby are  
allowed additional time up to and including the  
22d day of December, 1922, in which to file in the  
United States Circuit Court of Appeals for the  
Ninth Circuit the record in this cause, being the  
appeal of the said appellants from the decree en-  
tered herein on the 26th day of October, 1922, in  
favor of the said appellees.

Done in open court this 29th day of November, 1922.

JEREMIAH NETERER,  
District Judge.

[Endorsed]: In Bankruptcy—No. 6361. United States District Court for the Western District of Washington, Northern Division. In the Matter of Patterson-MacDonald Shipbuilding ompany, a Corporation, Bankrupt. Order Extending Time. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 29, 1922. F. M. Harshberger, Clerk. By P. A. Page, Deputy.

No. 3978. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Jan. 29, 1923, to File Record and Docket Cause. Filed Jan. 26, 1923. F. D. Monckton, Clerk.

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**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

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In the Matter of

PATTERSON - MACDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt.

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COMMONWEALTH OF AUSTRALIA, *Petitioner,*  
VS.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee  
in Bankruptcy of Patterson-MacDonald Ship-  
building Company, a Corporation, Bankrupt,  
*Respondents.*

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COMMONWEALTH OF AUSTRALIA and MARK SHEL-  
DON, as Commissioner for the Commonwealth  
of Australia, *Appellants,*  
VS.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee  
in Bankruptcy of Patterson-MacDonald Ship-  
building Company, a Corporation, Bankrupt,  
*Appellees.*

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**BRIEF OF RESPONDENTS AND APPELLEES**

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IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,

*Attorneys for Respondents  
and Appellees.*

614 Colman Building, Seattle, Washington.

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**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

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In the Matter of

PATTERSON - MACDONALD SHIPBUILDING COM-  
PANY, a Corporation, Bankrupt.

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COMMONWEALTH OF AUSTRALIA, *Petitioner,*  
vs.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee  
in Bankruptcy of Patterson-MacDonald Ship-  
building Company, a Corporation, Bankrupt,  
*Respondents.*

---

COMMONWEALTH OF AUSTRALIA and MARK SHEL-  
DON, as Commissioner for the Commonwealth  
of Australia, *Appellants,*  
vs.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee  
in Bankruptcy of Patterson-MacDonald Ship-  
building Company, a Corporation, Bankrupt,  
*Appellees.*

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**BRIEF OF RESPONDENTS AND APPELLEES**

---

IRA BRONSON,  
J. S. ROBINSON,  
H. B. JONES,

*Attorneys for Respondents  
and Appellees.*

614 Colman Building, Seattle, Washington.

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**In The United States  
Circuit Court of Appeals  
For The Ninth Circuit**

In the Matter of PATTERSON-MacDONALD SHIPBUILD- ING COMPANY, a Corporation, Bankrupt.		}
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COMMONWEALTH OF AUSTRALIA, <i>Petitioner,</i>		}
VS.		
A. M. MacDONALD and JOHN L. Mc- LEAN, as Trustee in Bankruptcy of Patterson - MacDonald Shipbuilding Company, a Corporation, Bankrupt, <i>Respondents.</i>		} No. 3961
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COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia, <i>Appellants,</i>		}
VS.		
A. M. MacDONALD and JOHN L. Mc- LEAN, as Trustee in Bankruptcy of Patterson - MacDonald Shipbuilding Company, a Corporation, Bankrupt, <i>Appellees.</i>		} No. 3978
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**Brief of Respondents and Appellees**

**MOTION TO DISMISS APPEAL**

The same question presented by the petition to revise is also brought up by an appeal, and it has been stipulated that both proceedings may be con-

sidered and disposed of together. The appellees now move that this appeal be dismissed, for the reason that this court is without jurisdiction to entertain the same, and appellant is in default under Rule twenty-four of this court.

## ARGUMENT UPON MOTION TO DISMISS APPEAL

The order appealed from confirms an order of the referee making an allowance to A. M. MacDonald for services rendered and expenses incurred by him at the request of the trustee in connection with the administration of the estate and for its benefit. Such an order relates solely to a proceeding in bankruptcy of an administrative character and is not appealable under any of the provisions of the Bankruptcy Act. It does not constitute the allowance or rejection of a claim under Section 25-a (3).

*W. J. Davidson & Co. v. Friedman*, 140 Fed. 853, (C. C. A. 6th Cir.)

*Ohio Valley Bank Co. v. Switzer*, 153 Fed. 362, (C. C. A. 6th Cir.)

The order is subject to review in matter of law only under Section 24-b, and this remedy excludes jurisdiction of an appeal.

*W. J. Davidson & Co. v. Friedman*, *supra*.

*Ohio Valley Bank Co. v. Switzer*, *supra*.

*Kinkead v. J. Bacon & Son*, 230 Fed. 362, (C. C. A. 6th Cir.)

*Petition of Baxter*, 269 Fed. 344, (C. C. A. 6th Cir.)

*Yaryan Rosin & Turpentine Co. v. Isaac*, 270 Fed. 710, (C. C. A. 5th Cir.)

See also:

*In re Loving*, 224 U. S. 183, 56 L. Ed. 725.

*In re Creech Bros. Lbr. Co.*, 240 Fed. 8, (C. C. A. 9th Cir.)

*Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, (C. C. A. 9th Cir.)

*In re Mueller*, 135 Fed. 711, (C. C. A. 6th Cir.)

*Kirsner v. Taliaferro*, 202 Fed. 51, (C. C. A. 4th Cir.)

Furthermore, the appellant has failed to file any brief in support of its appeal, as required by Rule twenty-four.

## MOTION TO DISMISS PETITION FOR REVIEW

Respondents move that the petition for review be dismissed, because petitioner is not entitled to maintain the same.

## ARGUMENT UPON MOTION TO DISMISS PETITION FOR REVIEW

(a) When the petitioner's claim was originally presented to the referee in the bankruptcy proceedings, it was objected to by the trustee on various grounds, one being that the claim was unliqui-



dated. This ground of objection was confessed, and liquidation proceedings were instituted upon application to and direction of the district judge, who referred the matter to a special master. These liquidation proceedings have resulted in a finding and report by the special master, that petitioner has no claim, and that instead of the bankrupt being indebted to the claimant, it has overpaid the claimant \$312,602.48. The master's report has been confirmed by the district court, and an appeal from this decision has been taken. The determination of whether the petitioner is a creditor of the bankrupt involves questions of fact which cannot be considered in this proceeding. (See cases cited below, pages 7-8). Upon the record as it stands in this case, the petitioner is not a creditor, and is therefore not a party aggrieved who is entitled to bring a petition under Section 24-b of the Bankruptcy Act. (See respondents' answer, paragraph I).

(b) Even if petitioner be recognized as a party aggrieved, it cannot maintain this proceeding unless it shows that it has made a demand upon the trustee to review the order and he has refused to do so, and it has then upon motion been granted permission by the court to proceed in its own name.

*In re Mexico Hardware Co.*, 197 Fed. 650,  
(D. C. New Mexico).

*Shatfield et al. vs. O'Dwyer*, 101 Fed. 797,  
(C. C. A. 8th Cir.)

In this case, no request was made upon the

trustee to act, nor any permission secured by the petitioner, granting it leave to bring these proceedings in its own name. The petitioner, foreseeing this objection, has endeavored to meet it by the allegations of paragraph twelve of its petition, but these allegations, even if true, are insufficient to excuse its failure to follow the proper procedure.

*In re Mexico Hardware Co., supra.*

The reasons for the application of this rule are particularly strong in the present case, where petitioner has been twice determined to be not a creditor but a debtor of the estate. It has held up this order since the 23rd of August, 1922, and if it is entitled to maintain this proceeding, it can likewise interfere in its own name with every administrative step in the bankruptcy proceedings. To permit it to do this would be contrary to the salutary principles announced in the above cases.

#### ARGUMENT UPON PETITION FOR REVIEW.

Since Section 24-b of the Bankruptcy Act does not contemplate any review of the facts by this court, any questions presented upon this petition which involve or depend upon consideration and decision of disputed facts, cannot be entertained.

*Whitla & Nelson v. Boyd*, 213 Fed. 587, (C. A. 9th Cir.)

*In re Henry Siegel Co.*, 216 Fed. 943 (p. 946)  
(D. C. Mass).

*Chatfield et al. vs. O'Dwyer*, 101 Fed. 797,  
(C. C. A. 9th Cir.)

*Gaudette v. Graham*, 164 Fed. 311, (C. C.  
A. 9th Cir.)

*Kenova Loan & Trust Co., v. Graham*, 135  
Fed. 717, (C. C. A. 4th Cir.)

*In re Ann Arbor Machine Corp.*, 274 Fed.  
24, (C. C. A. 6th Cir.)

It therefore becomes material to determine at the outset to what extent the specifications of error submitted in petitioner's brief involve questions of fact. We shall take them up in irregular order.

The fifth specification urging that the allowance is excessive, may be entirely disregarded, as it presents a pure question of fact.

*Whitla & Nelson v. Boyd*, 213 Fed. 587, (C.  
C. A. 9th Cir.)

*Yaryan Rosin & Turpentine Co. v. Isaac*,  
270 Fed. 710, (C. C. A. 5th Cir.)

The second specification (Pet. Br. p. 6), raises the question of authority given to the trustee by the referee and the creditors to employ A. M. MacDonald. The objection made before the referee at the time of the allowance, (Record, p. 7, par. IV) was that MacDonald was not, in fact, employed to render any service, but no claim was made that the trustee was not authorized to employ him. This objection as then made, that MacDonald was not employed by the trustee to render the services in question, was not thereafter urged, but on its petition for review by the District Judge, and in its Assignments

of Errors in this proceeding (Record, pp. 22 and 12), the petitioner adopted the language of its second specification raising the question of whether the trustee was authorized to employ him. The referee certifies that the services rendered by MacDonald were at the request of the trustee and with the knowledge and consent of the creditors, and that at all times during the prosecution of the claim with which he was assisting, it was represented to the referee and the creditors by the trustee and his counsel that such services were absolutely essential. (Record, p. 16). He also states that the creditors and this petitioner were at all times kept fully advised of the rendering of such services and the apparent necessity therefore, and that the creditors and this petitioner from time to time consented at creditors' meetings, to payments being made to MacDonald to apply on account of such services. It appears that this matter must have come before the creditors at various meetings during the years 1921 and 1922, as orders making allowances to MacDonald on account of compensation for services, prior to the present order complained of, were made on February 16th, 1921, June 1st, 1921 and October 7th, 1921. (See respondent's answer, paragraph II; record on appeal pp. 4-9). This second specification of error, therefore, raises a question upon which the facts, as certified to by the referee, are at variance with petitioner's contention, and upon which the entire proceedings, oc-



cunning at numerous creditors' meetings at which MacDonald's employment was considered, are not presented to this court. The extent to which the trustee was authorized to agree with Mr. MacDonald to pay him compensation for his services is fundamentally a question of fact.

Furthermore, this issue raised by this specification is immaterial because the allowance was not predicated on any contract of employment by the trustee, fixing the amount of compensation to be paid, but was made in consideration of the beneficial services rendered the estate. Any defect in previous authority to the trustee to employ him was cured by the ratification of the referee and creditors in making the allowance.

In addition to all this, since this objection was not taken before the referee at the time the allowance was made, it will not be looked upon with favor by this court.

*In re Rome*, 162 Fed. 971 (D. C. N. J.).

*Household Supply Co. v. Whiteaker*, 236 Fed. 730, (C. C. A. 5th Cir.)

The third specification presents primarily a question of fact as to the character of the services rendered, which prevents a disposition of the point raised as a matter of law.

The first specification (Pet. Br. p. 5), relates to failure of the referee to segregate the allowance between expenses and services, and to show specifically what was allowed for each service rendered. No request for such a segregation was made of



the referee at the time the allowance was fixed. (Record, p. 7, par. IV). There is nothing in the Bankruptcy Act, rules or orders, requiring such segregation, and failure to make it is no ground for reversal.

*In re Smith*, 203 Fed. 369, (C. C. A. 6th Cir.)

If the allowance was not excessive, which is a matter that cannot be determined on this proceeding, no harm or prejudice resulted from failure to segregate or apportion it.

On page thirteen of petitioner's brief, the point is raised that there was no sworn statement filed regarding this claim. The trustee reported upon the services rendered by MacDonald, and the request for compensation was submitted by him in his report, which was the basis for calling the creditors' meeting at which the allowance was made. His report was under oath, and this alone would satisfy the requirements of Section 62 of the Bankruptcy Act. Moreover, as the referee specifically points out in his certificate on review, no objection was taken by petitioner at the time the allowance was made, on the ground of failure to file a sworn statement. (Record, p. 19; also Record p. 7, par. IV.) No error is assigned in this court on this ground, either in the petition (Record p. 11, par. XI) or in the specifications in the brief.

This disposes of all the specifications except the fourth and sixth, and we doubt if they submit

any concrete question of law unmixed with disputed questions of fact. If so, the proposition for consideration may be stated thus: Does the fact that MacDonald was a stockholder and officer of the bankrupt corporation preclude the allowance to him of reasonable compensation for services rendered the trustee and the estate in connection with the prosecution by the trustee of a claim against the Emergency Fleet Corporation involving more than a year of Mr. MacDonald's time, a large part of which was spent away from his home (Record, p. 10), from which claim approximately \$327,000 of value was realized, and also in connection with assisting the trustee in his defense against the liquidation proceedings brought upon the claim of the Australian Government against the bankrupt, originally filed for a sum in excess of a million dollars, and which has since been entirely off-set by allowances and counter-claims for extras, these proceedings requiring a vast amount of technical advice and information from Mr. MacDonald and likewise occupying several months of his time.

Petitioner claims that the trustee was entitled to require these services of Mr. MacDonald without compensation, because he was an officer of the bankrupt. To sustain this position, it attempts to reconstruct the Bankruptcy Act so to read as to make the term "bankrupt" cover the officers and stockholders of the bankrupt corporation, and to extend the duties required of a bankrupt by the

Act to the rendition of services such as Mr. MacDonald has performed.

Section 1-a (4) of the Bankruptcy Act, it is said, extends the word "bankrupt" to include a "person," and Section 1-a (19) provides that "person" shall include "officers." Therefore, it is argued, wherever the Bankruptcy Act refers to a bankrupt, the reference extends to its officers, if it is a corporation.

However, Section 1-a (18), immediately preceding, provides that the word, "officer," as used in the Act, means an official under the Act, such as a receiver, trustee, or the like. It does not refer to officers of a bankrupt corporation at all. Not only that, but in its reasoning, petitioner wholly ignores the provision of Section 1-a (4) that to come within the term, "bankrupt," the "person" must be one "against whom an involuntary petition or an application to set aside a composition, or to revoke a discharge, has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."

It is apparent, therefore, that Mr. MacDonald is not an "officer," and so not a "person" referred to by the act, and that in any event, he cannot be included within the term, "bankrupt," because the conditions attached to that term do not apply to him. Although an officer of the bankrupt corporation, Mr. MacDonald cannot, by any finesse of words, be constituted the bankrupt itself, and the

provisions relating to the bankrupt as such are wholly inapplicable to him.

He was, of course, subject to examination under Section 21-a, but the extent of his duty under that section was to attend and give testimony regarding the assets and liabilities of the bankrupt. But procedure under this section would have been wholly inadequate for the prosecution of the trustee's claim against the Emergency Fleet Corporation, and the resistance of the claim of the Australian Government in the bankruptcy court, and in the proceedings before the special master and board of arbitrators. (Record pp. 18 and 19.)

These proceedings required months of preparation and consideration of the facts involved relating to the contracts under way with the Fleet Corporation and the Australian Government, and involving technical shipbuilding skill and knowledge which the trustee had to secure from an expert source. Mr. MacDonald's assistance to the trustee in these matters has occupied a large portion of the time since the adjudication, and has certainly far exceeded the requirements of any service that could be exacted from him as a duty imposed by law without compensation, even were he the bankrupt himself.

These were matters that could not be handled to the advantage of the estate under Section 21-a. The services rendered in this case were of an extraordinary and special character. Without their voluntary rendition in a helpful spirit of co-operation, the trustee would have been able to make little headway



in collecting from the Fleet Corporation, as well as in resisting the claim of the Australian Government and passing upon many other claims involved in the bankruptcy.

The suggestion in petitioner's brief (p. 8) that it was necessary for the trustee to bribe the managing agent to disclose the facts relating to the assets of the bankrupt, is not only wrong but unfair and unjust. Had Mr. MacDonald been acting in this spirit he would undoubtedly have insisted on a contract with the trustee for a percentage of the profits or results secured before he would have rendered any services. He did not endeavor to hold up the trustee or the estate in any such fashion, but rendered his services at the trustee's request and then, on their completion, left the matter to the court and creditors to allow him what they should decide was fair for what he had done. The petitioner was quite willing to have Mr. MacDonald render all possible service in collecting from the Fleet Corporation, because the funds so received would be for its benefit if it succeeded in establishing its own claim. It was present at the meetings when allowances were made to him on account of such services, and it fully understood that Mr. MacDonald was expecting compensation from the estate and the trustee for such services. It took no steps to prevent or review the allowances made to him specifically on account of services, and raised a question only after he had completed such services and the estate had



been enriched by the collection of approximately \$327,000. That, in itself should constitute a conclusive bar to the objection petitioner now urges.

But petitioner now says that it permitted these allowances to pass without objection because it considered them applicable to Mr. MacDonald's expenses and witness fees. Passing over the facts as certified to by the referee, and the language of the orders of allowance, which seem to be conclusive of the basis on which Mr. MacDonald was acting, we call attention particularly to the specific allowance of \$1500 on account of services, dated June 1st, 1921. (Record on appeal, p. 8). Upon petitioner's explanation that it acquiesced in this as an allowance for witness fees, in spite of the fact that there is no record of his having spent a single day in court, this one allowance would be fees for 500 days services, which was a longer time than the company had been in bankruptcy up to the date it was made. It is impossible to reconcile these allowances with any theory other than that Mr. MacDonald was to receive reasonable compensation for his services.

No cases have been cited by petitioner holding that as an officer of the bankrupt corporation, Mr. MacDonald was under any duty to furnish or render services of the extent, character and magnitude that he has furnished the trustee in this case, or was subject to any duty other than that of submitting to examination under Section 21-a of the Act. Reference is made to a few cases bearing

upon allowance of fees to the bankrupt for attending as a witness, and the allowance of fees for attorneys for the trustee, but these are matters specifically covered by the provisions of the Act, and have no application to the point under discussion as to the obligation of an officer of a bankrupt corporation to render extraordinary services without compensation.

Even if it be conceded that Mr. MacDonald was subject to the provisions imposing duties on the bankrupt as if he was the bankrupt himself, still he would be entitled to compensation for these services. The case of

*In re Lane Lbr. Co.*, 206 Fed. 780,  
affirmed by this court under the title of

*Whitla & Nelson v. Boyd*, 213 Fed. 587,  
holds that attorneys for the bankrupt, who voluntarily, or at the bankrupt's request, join with the trustee in resisting claims, are not entitled to compensation from the estate therefor, because the bankrupt is under no legal obligation to perform such duties, that burden being upon the trustee and the creditors.

"The extent of the bankrupt's obligation was to furnish to the receiver such material information as was in his possession." 206 Fed. 783.

Therefore, if Mr. MacDonald be treated on the same basis as the bankrupt, he was, nevertheless, furnishing information and rendering services at

the request of the trustee, which the bankrupt was under no obligation to furnish.

*In re Barrow*, 98 Fed. 582 (D. C. Va.), the bankrupt was held entitled to reasonable compensation for services performed by him in the care and conservation, after date of bankruptcy, of property found to belong to the estate, although the bankrupt had claimed and cared for it as his own.

It will be assumed that the referee and the lower court, in fixing the allowance, took into due account and made allowance for the furnishing of information insofar as it was Mr. MacDonald's statutory duty to do so, and that the allowance made represents what they considered reasonable for the extraordinary services performed by him.

"We are of the opinion that, within the limitations of these provisions, the allowance of necessary expenses in bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof."

*United States v. Ward*, 257 Fed. 372 at p. 377 (C. C. A. 8th Cir.).

The amount allowed is considerable, but the services rendered were extraordinary in character, and productive of results of large magnitude, and the question of the reasonableness of the allowance is a question of fact not before the court on this review. The only question is whether the bankruptcy court could compel him to go to the extent of ren-

dering the services which he has performed under the act without compensation? If not, the petition should be denied.

Respectfully submitted,

IRA BRONSON,

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*Attorneys for Respondents  
and Apellees.*





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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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IN THE MATTER OF  
PATTERSON-MacDONALD SHIPBUILDING COMPANY, a  
Corporation,

**Bankrupt,**

COMMONWEALTH OF AUSTRALIA,

**Petitioner,**

vs.

A. M. MacDONALD and JOHN L. McLEAN, as trustee in  
bankruptcy of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, Bankrupt,

**Respondents,**

COMMONWEALTH OF AUSTRALIA and MARK SHEL-  
DON, as Commissioner for the Commonwealth of Aus-  
tralia,

**Appellants,**

vs.

A. M. MacDONALD and JOHN L. McLEAN, as Trustee in  
Bankruptcy of Patterson-MacDonald Shipbuilding Com-  
pany, a Corporation, Bankrupt,

**Appellees.**

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REPLY BRIEF OF PETITIONER  
AND APPELLANTS

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REPLY BRIEF OF PETITIONER  
AND APPELLANTS

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The petitioner and appellants, in accordance with the permission of this court granted in the argument, files this, a brief in reply to the brief of respondents and appellees.

## RESPONDENTS' MOTIONS TO DISMISS.

Respondents move to dismiss the appeal upon two grounds: First: That petition for revision is the proper remedy. We agree with the respondents upon this point but merely state that both revision and appeal were perfected out of an excess of caution. This practice has received the express approval of this court in *Chavelle v. Washington Trust Company*, 226 Fed. 400, 405, and *In re Creech Bros. Lumber Co.*, 240 Fed. 8, 12, first paragraph.

Second: Because no brief has been filed in the appeal case. Upon the record as it originally stood, the appeal case would not have been placed upon the docket until the May term, so that appellant would have had at least until the 1st of March in which to file a brief in this case. In the stipulation for consolidation, however, it was stipulated that the appeal case might be heard along with the revision case, but the consideration for such stipulation was that "the above mentioned case on appeal may be heard and determined upon the briefs filed in the revision case and upon the argument of the revision case." Counsel for the respondent, however, at the time of the argument stated that while he did not agree with our interpretation of this stipulation, he waived this point of his motion.

Respondents next move to dismiss the petition for revision upon two grounds:

First: That the petitioner has no standing in this court. The petitioner has duly filed its claim and pressed the same to an adjudication. The mere fact that the lower court has decided this case against the petitioner does not prevent it from taking all necessary steps to preserve its rights.

If the decision of the district court disallowing the claim of the petitioner should be reversed upon appeal, this petitioner is an interested party to the extent of over 90 per cent. of the total amount of this claim. The referee recognized our right to object to this allowance before him and this recognition was made without any protest on the part of anybody at the creditor's meeting. The referee recognized our right to a petition for review by sending it up together with his certificate to the district court, and the district court has recognized our rights in the matter by hearing the case upon the merits: all this without any objection on the part of either of the respondents. It is clear that we have a very substantial interest in the result of this proceeding and clearly come within the purview of the statute giving to "any party aggrieved" the right to petition this court to exercise its revisory power under Sec. 24 (b) of the Bankruptcy Act.

*Second:* The respondents urge the dismissal of the petition for revision on the second ground that



a creditor can not file a petition for revision without first making a demand upon the trustee to review the order. In support of this position they cite two cases, both of which are to the effect that one creditor can not appeal from an order allowing the claim of another creditor but such appeal must be taken in the name of the trustee. This, we respectfully submit, is not the present state of the law. Respondents cite but one case from an appellate court, that of *Chatfield v. O'Dwyer*, 101 Fed. 797, a decision by the circuit court of appeals for the 8th circuit. This same court however, in the case of *Rosenbaum v. Dutton*, 203 Fed. 838, 841, used the following language:

“We are of the opinion that by ‘parties in interest’ in this section of the Bankruptcy Act are included all persons who have an interest in the *res* which is to be administered. *In Re Sully*, 152 Fed. 619, 81 C. C. A. 609, it was held:

‘The term “parties in interest” applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt.’

In the instant case the only parties who have any interest in the *res* of this bankrupt are the appellants, for they are the only persons who can be injuriously affected by the result of the determination of this claim of appellee. It is true that it has been determined by this court in *Chatfield v. O'Dwyer*, 101 Fed. 797, 42 C. C.

A. 30, that an appeal from an order of the District Court allowing a claim presented by a creditor against the estate of the bankrupt, and which was objected to and contested by another creditor, can only be taken by the trustee in bankruptcy as the representative of all the creditors, but it was further held in that case, if the trustee in such a case refuses to appeal from the allowance of the claim on the request of the objecting creditor, the latter may move the District Court to direct the trustee to take an appeal as requested, or to permit the creditor to prosecute an appeal in the name of the trustee. In that case the trustee was not a party to the petition for review, nor was there any effort made to have him become a party to or permit the appellants to take an appeal in his name, while in the case at bar the trustee had joined appellants in the petition for review, and when it came up for hearing withdrew.”

The last quoted opinion of the circuit court of appeals for the 8th circuit is merely in line with the decisions of the other federal appellate courts,—*In re Sully*, 152 Fed. 619, 620, where the circuit court of appeals for the 2nd circuit held that creditors had a right to re-examine claims that had been approved by the trustee; *Ohio Valley Bank v. Mack*, 163 Fed. 155, 156, where the circuit court of appeals for the 6th circuit entertained an appeal prosecuted by a creditor, and *In re National Pressed Brick Co.* 212 Fed. 878, 883, where the circuit court of appeals of the 6th circuit used the following language:

“Motion is made to dismiss the appeal from the allowance of the other claims because not taken by the trustee, and for lack of evidence that that officer had refused a request to appeal. A creditor may, under proper circumstances, be permitted to take an appeal when the trustee has refused to do so.”

But even if that should be the law as to appealing from an order approving a claim of a creditor, such a rule did not apply in this case, for the following reasons:

The allowance of a creditor's claim is a judicial matter. The issues are made up and tried as a judicial matter by the creditor on the one side and the trustee upon the other. The trustee is ordinarily the only party who appears in opposition for the reason that he represents all of the creditors and there is no provision made in the statute for a creditor's even so much as having notice of the proceedings which are to result in the allowance or disallowance of the claim. In the present proceeding, however, the matter is different. The matter came up in a creditor's meeting, on the petition of the trustee to be permitted to make this payment. This petition shows that he employed Mr. MacDonald and rendered himself liable for compensation to be paid to Mr. MacDonald and asked the approval of the creditors to such action. It was a proceeding of which, under the bankruptcy act, every creditor was entitled to have notice, and at which any creditor was en-

titled to make objection at such creditors' meeting. Of what use is the provision in the bankruptcy act requiring the creditor to be given notice of the proceeding if the creditor is not entitled to make any objection? And what use is it to make objection before the referee if he would not be entitled to carry such objection to the district court and to this court? The theory of the cases cited by the respondents is that the trustee represents all the creditors. In this case, however, the trustee is a partisan and a violent partisan at that, of Mr. MacDonald. The firm of attorneys who have acted throughout as attorneys for the trustee appeared in the district court in support of the order giving Mr. MacDonald this compensation. The trustee was united with Mr. MacDonald as a party respondent in the appellate proceeding, is appearing in this court by the same attorneys, and through his attorneys has united with Mr. MacDonald in filing his brief asking that this compensation be paid. Under such extraordinary circumstances it would most certainly be an extraordinary situation to expect a trustee to sue himself by appearing as a petitioner in this court asking to have an order set aside which he has stoutly striven for, both before the referee and the district judge. If the trustee were the petitioner in this case, there can be not the slightest doubt that even if he should make a bona fide attempt to reverse the order of the district court, under the state of this record he



would be held to have effectually estopped himself from such a procedure in view of the extraordinary situation in this case of a trustee becoming a partisan supporter of what a creditor considers an improper claim. To deny that such creditor is not "any party aggrieved" under §24(b) would be clearly in violation of both the spirit and the letter of the bankruptcy act.

As we have heretofore said, opposing another point of respondents, both the referee and the district judge have, in view of the extraordinary circumstances of this case, recognized our right to be heard upon the merits of this question, without objection on the part of the trustee. The trustee is a party in this proceeding and has full opportunity to be heard and is being heard even if it is in direct opposition to the interests of the creditors, and unless a creditor can be heard, the payment of the sum of \$13,500. must be permitted to be made by default.

#### ON THE MERITS.

We fully agree with the respondents in their legal position that in passing upon the petition for revision under §24(b) of the Bankruptcy Act, this court will consider only disputed questions of law.

The respondents have filed an answer in this case which does not contain a denial of a single ma-



terial fact as set forth in the petition for revision. The questions submitted by the petition for revision are purely questions of law founded either upon undisputed facts, or a total absence of any evidence in the record sufficient to justify the action of the District Court.

Taking up the specifications in the order which the respondents used, we will first take up the question of

#### EXCESSIVE ALLOWANCE.

In this case both the referee's certificate (Rec. p. 18 and the order for disbursement (Rec. p. 24) show clearly that the referee made an allowance which he considered proper for both Mr. MacDonald's expenses and his services in connection with the claim against the shipping board, and his services in connection with contesting the claim of the Australian Government.

This allowance is, therefore, excessive in that it is clearly made for three causes, and even if we should assume that one of those claims, his services at Washington, is good, it clearly appears that the allowance was made on account of expenses and services in pointing out the objections to petitioner's claim. The referee in his certificate frankly admits that an allowance for expenses as such would be er-

roneous (Record p. 18) and we have shown in our opening brief good and sufficient reason why any allowances for compensation in assisting the resistance of the claim of the Australian Government are out of the question. The referee, however, has included these two items in a blanket allowance, and such allowance is clearly erroneous and excessive as a matter of law and therefore should not be allowed to stand.

#### NO EMPLOYMENT OF MACDONALD.

The respondent under this head claims that no objection was made before the referee on the ground that the trustee was not authorized to employ MacDonald, that the objection was merely that MacDonald was never employed. There are two essentials to a contract which purports to have been made by an agent; one is the actual making of the contract and the other is the authority of the agent to make such a contract. If the agent was not authorized to make such a contract, there was clearly no contract. Therefore, the objection that no contract was ever made includes the objection that if the trustee attempted to make any such contract, he was not authorized to make such a contract. Where the contract purports to have been made by an agent, it is just as much an absolute essential to prove the au-

thority of the agent as it is to prove the actual making of the contract, and denial in pleadings that a contract was ever made is clearly a denial sufficient to authorize the denial of the authority of the agent to make such contract. This objection of the respondents is merely a play upon words.

But even if the petitioner had not mentioned this objection specifically at the creditors' meeting, it was raised specifically and definitely in its petition for review. (Record p. 22, Specification of Error 3.) Counsel for the respondents both upon this point and in various other places in their brief appear to be of the opinion that every point of law advanced in a petition for review has been waived if the same identical point of law had not already been advanced before the referee at the time of the hearing before the referee, but such is not the law, as can be gathered from the following quotations:

“If a point is presented by the record, a district court may consider it although it was not discussed before or by the referee. The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any points presented by the record.”

*Collier on Bankruptcy*, 12th Ed. 1921, Volume 1, p. 673.

“It is said, for instance, that the court may properly consider any point presented by the record before it whether or not such point was

discussed before or by the referee, and it has even been held that it is perfectly permissible for the judge to take any testimony if it is offered before him."

*Black on Bankruptcy*, 3rd Ed., p. 179.

"Upon the point of practice raised preliminarily to the main argument, we are clearly of the opinion that, when a District Court is reviewing an order or report of a referee in bankruptcy, under the very broad provisions of Act July 1, 1898, c. 541, §2 (10), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), it may properly consider any point presented by the record then before it, whether such point was or was not discussed before or by the referee."

*In re Samuel Wilde's Sons*, 144 Fed. p. 972 (C. C. A., 2nd Cir.).

### IS THE PETITIONER ESTOPPED?

Respondents then claim that because the court had already made Mr. MacDonald allowances on account of services and expenses, thereby the petitioner is estopped from questioning this allowance. We would call attention to the fact that there is not a scintilla of evidence that the idea was ever advanced that Mr. MacDonald was to receive any compensation for services rendered in defeating the Australian Government's claim until his letter of July 20, 1922, claiming such compensation. The previous

orders were all made in connection with his expenses upon his trip to Washington and were made generally without any specification as to what services were being paid for, and according to Mr. MacDonald himself were credited by him on account solely of expenses (transcript of record on appeal, p. 18). The claim that the Australian Government ever consented to or acquiesced in the trustee employing a witness hostile to the Australian Government and agreeing to pay him a fancy price for his services would be the height of the ridiculous.

#### THE CHARACTER OF THE SERVICES RENDERED.

The respondent under this heading appears to take it for granted that we are merely differing with the referee and the district judge upon the quality of the services rendered, but our objection goes farther. There is absolutely not the slightest scintilla of evidence in this case as to what those services were that would justify such a bountiful compensation. There are several adjectives used such as extraordinary, indispensable, and the like, but it is a very easy matter to use such adjectives. Mr. MacDonald presented his bill and on account of its indefiniteness he was ordered by the judge to file an affidavit regarding the nature of his claim. In addition to that, the statement of evidence shows that



the nature of his services was questioned at the creditors' meeting. In our opening brief, we asked for the nature of these services, and all that we have ever been able to elicit from anybody was that these services were "extraordinary," "indispensable" and "consisted of assembling documents" and the like. We fully appreciate the fact that frequently courts have held that the allowance of *attorney's fees* are purely within the discretion of the court to be determined, even without the taking of evidence, but that is based upon the fact that the services had been rendered before the court who is fixing the fee and who is himself a lawyer and amply qualified to pass upon the reasonableness of the fees. But here is a case where none of the services were rendered before the referee; they were not the kind of services as to qualify the referee to be able to fix their value; in fact, they were merely an appeal to the generosity of the referee unsupported by any evidence whatever.

#### NO SWORN STATEMENT.

Next, the respondents claim that because the letter of Mr. MacDonald claiming compensation was attached to the trustee's report which report contained the statement that he had received such letter and was made under oath, was a sufficient compliance with §62 of the Bankruptcy Act which re-

quires that "the actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath." This letter contained a list of expenses which the referee at the time of the hearing found to be absolutely unsupportable and this same list was repeated in Mr. MacDonald's affidavit.

A stipulation made between the parties contains the point blank statement that there was no sworn statement, either oral or written, made regarding the nature of the services rendered by the said A. M. MacDonald for the said bankruptcy estate. (Record on Appeal p. 35). If this procedure is to obtain the approval of this court as a substantial compliance with §62 of the bankruptcy act above quoted, most of the bankruptcy act might as well be repealed and the entire administration of the bankrupt's assets be turned over to the referee to be administered by him as shall seem best to him in the exercise of an arbitrary discretion without any chance of review or appeal offered to any of the interested parties.

We respectfully submit that the purely technical points of law raised in the respondents' brief are without merit and that the order of the District Court should be reversed.

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*Attorney for Petitioner and Appellants.*











